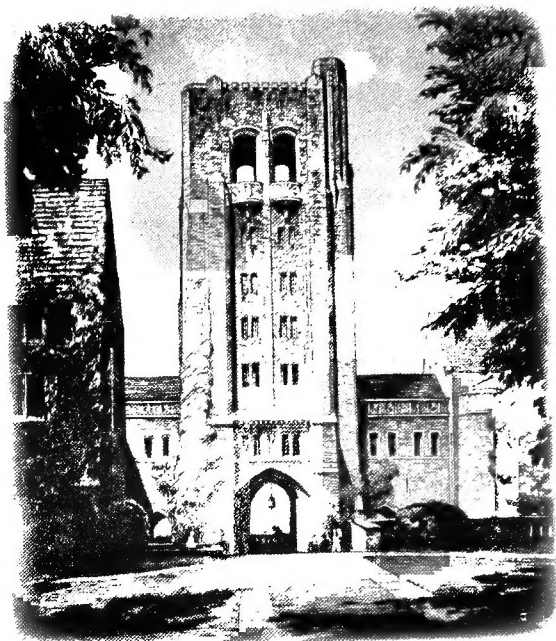


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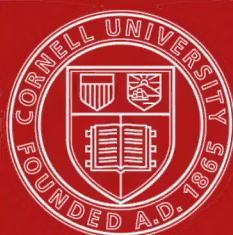
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THE
LAW AND PRACTICE
OF
INJUNCTIONS
IN EQUITY
AND AT
COMMON LAW.

BY WILLIAM JOYCE, Esq.,
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CHAPTER VII.

COMPANIES (RAILWAY AND OTHER PUBLIC COMPANIES.)

SECT. 1. *Railway Companies.*

PART I.

1. The directors of a railway company are not justified in acting on an old resolution authorizing the issuing of shares, after the particular purpose for which the authority was given has ceased to be available; nor in issuing shares, supposing them to have the power, for the express purpose of creating votes to influence a coming general meeting, and an injunction will be issued to restrain the issue of such shares, it not being a question of the internal management of the company, but an attempt on the part of the directors to prevent such management from being legitimately carried on (1). And although it is competent to directors of every railway company, on complying with the Wharnccliffe order, to apply to Parliament for an extended line, or for any other extension of their powers, they will be restrained from defraying the expenses of such application out of the assets of the company, and from issuing new shares purporting to be shares in the company, except for the purposes and under the powers of existing Acts (2).

Directors of railway company must not issue shares after the purpose for which authority given has ceased; nor, to create votes to influence a coming general meeting.

Directors of railway company will be restrained from defraying expense of application to Parliament for extension of powers, and from issuing new shares except under existing powers.

2. Where a railway company, after exhausting their parliamentary borrowing powers, issued bonds in the form known as Lloyd's bonds, viz., an acknowledgment of debt and a covenant to pay with interest on a future day, partly to a contractor, the price of works performed by him for the company, and partly to persons who supplied a parliamentary deposit, and at the time of the issue the company was promoting or contemplating a bill, which was ultimately passed, to enable them to raise further share and loan

The issue of Lloyd's bonds, (after exhausting parliamentary borrowing powers) payable at a future day to a contractor for work done, and to persons supplying par-

(1) *Fraser v. Whalley, Gartside v. Whalley*, 2 H. & M. 10.

(2) *Vance v. East Lancashire Railw. Co.*, 3 K. & J. 50.

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SECT. 1.

liamentary
deposit (here)
not illegal.

capital; Vice-Chancellor Sir W. P. Wood held, upon demurrer, that these facts would not justify the Court in declaring the bonds illegal, although the bonds were in excess of the authorized capital and the borrowing powers granted to the company by Parliament. But the Vice-Chancellor said that if the company were about to apply for an Act, and to issue such bonds for raising the money required for the parliamentary deposit, it was possible the Court might restrain them from so doing; but that that was very different from interfering after the money had been raised and employed, *bonâ fide* and successfully, for the purpose of obtaining the further Act (1).

It is sufficient to entitle a railway company to take lands if they are within the limits of deviation; the particular works need not appear on deposited plans.

3. It is not necessary, in order to entitle a railway company to take lands for the purposes of their works, that the particular works should appear on the deposited plans. It is sufficient that the land should be within the limits of deviation delineated on the plan (2).

Valuation of house by surveyor not entering house, not a proper one. A bond for payment "at any time hereafter" is not a proper bond, and is a departure from sect. 85 of Lands Clauses Consolidation Act.

4. A valuation of a house taken by a railway company, by a surveyor who did not enter the house valued, is not a proper valuation (3). And a bond conditioned for payment "at any time hereafter," on deposit in the bank for the benefit of the parties interested of the purchase-money or compensation, is not a proper bond, and is a departure from the 85th section of the Lands Clauses Consolidation Act, and an order was made restraining the company from taking possession until a proper valuation had been made and proper bond given, or a jury had pronounced their verdict, and the money had been deposited (4).

Party having an equitable lease is entitled to have its value ascertained (and not by justices under s. 121) or, to the certificate and bond under sect. 85 of

5. A written agreement, void at Law but equivalent in Equity to a lease, is an interest greater than a yearly tenancy within the Lands Clauses Consolidation Act, and a tenant having and producing such an agreement is not liable to have the value of his interest assessed by two justices under sect. 121 of that Act, and the company was restrained from dealing with the property until the value of the plaintiff's interest had been ascertained, or the certificate and bond

(1) *White v. Carmarthen and Cardigan Railw. Co.*, 1 H. & M. 786; 33 L. J. (Ch.) 93; 12 W. R. 68.

(2) *Wilt v. South Western Railw.*

Co., 32 Beav. 341.

(3) *Cotter v. Metropolitan Railw. Co.*, 10 Jur. (N. S.) 1014; 12 W. R. 1021.

(4) *Ib.*

required by the Act (sect. 85) had been obtained and given (1).

Lands Clauses
Consolidation
Act.

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6. The Court has not jurisdiction to decree the specific performance of a contract for which the consideration on the part of the plaintiff is the execution of certain works which the Court is unable to superintend (2); therefore, where a bill stated an agreement to employ the plaintiffs as contractors for making a railway, and to pay for the works in debentures and shares of the company, on a motion in the terms of the prayer of the bill, the Court refused an injunction to restrain the company from permitting any other except the plaintiffs from constructing the railway, and from parting with the debentures and transferring the shares to another Brighton Company in derogation of the plaintiffs' rights, to which (the Brighton) company, the former (B. U. & T. W. Railway Company) had arranged for the sale of their undertaking. And though where a contract contains an express negative covenant, and complete justice can be done between the parties, the Court will grant an injunction to restrain a breach of the negative covenant; yet the Court rarely interferes where there is no distinct negative stipulation, but the negative obligation is inferred only from the positive contract (3). And if an agreement involve personal service, and as such is one of which the Court is not in the habit of granting a decree for specific performance, the Court will not interfere by injunction to restrain a company from acting up to a resolution dispensing with such personal service; so held by Vice-Chancellor Sir W. P. Wood in a case where an agreement had been entered into by carriers and a railway company by which duties were to be performed by the carriers in loading and unloading goods at the termini of the railway; and it was declared and understood between the parties that it was not the intention of the company to take such duties into their own hands, unless their interests should appear to them absolutely so to require, in consequence of such duties not having been performed satisfactorily by the agents (the carriers) or by the servants under their control;

No specific performance of contract where the consideration is execution of works which Court cannot superintend.

Injunction granted to restrain breach of express negative covenants where complete justice can be done, but Court rarely interferes where the negative obligation is inferred only from the positive contract. If agreement involve personal service, Court will not restrain company dispensing with such personal service.

(1) *Sweetman v. Metropolitan Railw. Co.*, 1 H. & M. 543; *vide Rogers v. Hull Dock Company*, 10 Jur. (N. S.) 1245.

(2) *Peto v. Brighton, Uckfield, and Tunbridge Wells Railw. Co.*, 1 H. & M. 468; 32 L. J. (Ch.) 677.

(3) *Ib.*

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and the company afterwards came to a resolution that the system of dealing with the goods traffic inside the then station and other London stations of the company was unsatisfactory, and that the interests of the company required that the loading and unloading of the goods traffic in such stations should be performed by the company themselves (1). So in *Horne v. North Western Railway Company* (2) the same Vice-Chancellor held that the Court would not interfere by injunction to restrain a railway company from determining, even upon a notice which may be irregular and insufficient, an agreement with contractors for the performance of certain duties in reference to the goods traffic of the line, the agreement involving personal service, and as such being one of which the Court would not grant specific performance.

House and garden one side of road, and pleasure ground on other side, are not parts of a house within sect. 92 of Lands Clauses Consolidation Act; nor a field separated from garden of house by a ha-ha, and gravel walk.

7. Where a person held under the same lease a piece of ground on the south side of a public road on which his house and garden were situate, and a corresponding piece of ground of equal width on the north side, on which he was prohibited from building, but it was used for the purpose of recreation and pleasure, and a railway company was desirous of taking the north piece only; the Court refused, on motion, to compel them to take both, as being parts of a house within the 92nd section of the Lands Clauses Consolidation Act (3). So, a field, separated from the garden of a house by a ha-ha, traversed by a gravel walk leading to a coachman's house at the further end, and used occasionally for purposes of pleasure (as archery and dancing) though chiefly as pasture for cows, was held not to be part of the house within the same section (4). And that section is applicable although the landowner may have only a leasehold interest (5).

Landowner can only compel whole of land to be taken.

8. A landowner, part of whose house, within the meaning of the 8 Vict. c. 18, s. 92, is taken by a railway company, cannot compel the company to take any portion beyond what it requires less than the whole; *semble, per* Lord Justice Turner, agreeing with the Master of the Rolls Sir J. Romilly (6). But where a railway company had given notice to the plaintiffs of their intention to take a part of his property, and the surveyors of the parties met, and it was

Company compelled to take whole, and (here) on verbal agreement.

(1) *Chaplin v. North Western Railw. Co.*, 5 L. T. (N. S.) 601.

(2) 10 W. R. 170.

(3) *Ferguson v. London and Brighton Railw. Co.*, 33 Beav. 103.

(4) *Pulling v. London, Chatham, and Dover Railw. Co.*, 10 Jur. (N. S.) 665; 33 L. J. Ch. 505.

(5) *Ib.*

(6) *Ib.*

verbally agreed that the company would take the whole of the property, but there was no written notice on the part of the landowner requiring the company to take the whole, and the company, however, proceeded to have part of the property valued, and to pay the money into Court, and to take compulsory possession of that part of the property, and thereupon the plaintiff filed his bill for an injunction to restrain them, and to compel them to take the whole; Vice-Chancellor Sir J. Stuart held that the course which the plaintiff had taken was that which he had a right to take, and that he was entitled to all the costs of the suit (1). Where a railway company gave to the plaintiffs notice to treat for the purchase of a portion of a piece of land; and the plaintiffs gave the company a counter notice to take the whole, and the company paid into Court the value of the portion of the piece of land described in their notice to treat, and gave to the plaintiffs the usual bond for the amount, and went into possession of the portion; in a suit for a declaration that the company was bound to purchase the whole of the premises comprised in the counter notice, and for an injunction to restrain the company from taking any further proceedings to entitle themselves to a part of the premises without taking the whole, it was declared that the company was so bound, and an inquiry was directed as to title, reserving further consideration; and the title having been found good, but the company not having gone into possession of the rest of the premises described in the counter notice, or taken any further steps, it was held by Vice-Chancellor Sir W. M. James, on further consideration, that the plaintiffs were entitled to an order compelling the company forthwith to take all necessary and proper proceedings under the Lands Clauses Act for the purpose of ascertaining the amount to be paid by them to the plaintiffs as the value of the premises (2). And under sect. 92 of the 8 Vict. c. 18, a company was held bound to purchase the whole of a property, although consisting of three new houses erected and covered in, but never completed, and in an unfinished state, which had fallen into a state of great dilapidation, and although the company only required a portion of the land upon

(1) *Binney v. Hammersmith and City Railw. Co.*, 9 Jur. (N. S.) 773; 8 L. T. (N. S.) 161.

(2) *Mason v. London, Chatham, and Dover Railw. Co.*, L. R. 7 Eq. 546; 38 L. J. (Ch.) 371; 20 L. T. (N. S.) 773.

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The word
"house" in
sect. 92 of
Lands Clauses
Consolidation
Act, includes
only what
would pass by
a conveyance
of a house,
and not a field
(here) used
for pleasure
and not of
necessity, and
separated from
house by a
road.

which the houses stood, which land was intended to be attached to the houses as gardens (1). But in *Fergusson v. London, Brighton, and South Coast Railway Company* (2), the Court held that the word "house," in sect 92 of the 8 Vict. c. 18, includes only what would pass by a conveyance of a house, and does not include a field occupied with the house, which is not necessary to the occupation of the house. In this case the plaintiff was under one and the same instrument lessee of a house and garden, and also of a piece of meadow land, separated from them by a road originally made for the convenience of himself and the lessees of the adjoining house, but afterwards thrown open to the public; each of the other lessees had also a strip of land on the other side of the road; and these strips were all thrown into one piece, and were used by the lessees in common as a cricket and pleasure-ground, and were let by them to a butcher for grazing purposes. The railway company required this piece of land for its line, but the plaintiff insisted that the company must take his house and garden as well, and, on the company's refusing to do so, filed a bill for an injunction, but it was held by Lord Justice Turner, agreeing with the Master of the Rolls, Sir J. Romilly, but *dissentiente* Lord Justice Knight Bruce, that this strip of land was not included in the word "house" as used in the 92nd section, inasmuch as it was for pleasure only, and not of necessity to the enjoyment and occupation of the plaintiff's residence, and would not have passed by a conveyance of the house simply (3). But under sect. 92 of the 8 Vict. c. 18, a railway company was held bound to take the whole property where it proposed taking only a part of the garden attached to a dwelling-house, thereby cutting off the end of the garden and the summer house (4). And in *Hewson v. London and South Western Railway Company* (5), it was held that the term "house" in this section of the Act includes everything that would pass under an ordinary conveyance of a house. And where a house had attached to it a shrubbery and a series of gardens separated by walls, but all

(1) *Alexander v. Crystal Palace Railw. Co.*, 30 Beav. 556; 31 L. J. (Ch.) 500; 8 Jur. (N. S.) 833.

(2) 33 L. J. (Ch.) 29; 9 Jur. (N. S.) 776.

(3) *Ib.*

(4) *Cole v. West London and Crystal Palace Railw. Co.*, 27 Beav. 242.

(5) 8 W. R. 467; *et v. King v. Wycombe Railw. Co.*, 28 Beav. 104.

connected by a gravel walk passing the dividing walls; Vice-Chancellor Sir W. P. Wood held, that the garden farthest from the house, and inclosed at a more recent period than the others, was part of the house within the meaning of the Act, so that a railway company could not take it without taking the whole house. And where the trustees of a charity had purchased land, and had covenanted to erect upon it buildings, consisting of a hall in the centre, with almshouses (some on each side of the hall, and others forming wings of the main building), with a garden in the centre, and a portion was to be built within a specified time, and the rest as funds were subscribed, but before more than the centre was completed a railway company required to take a portion of the land which, when the design was completed, would be part of the garden in front of one of the intended almshouses; the Lords Justices (reversing the decision of Vice-Chancellor Sir W. P. Wood) held, that the land was part of a house within the meaning of the 92nd section of the 8 Vict. c. 18, and that the word "house" in that section must be interpreted as used in the ordinary and legal, if not universal sense, in which the law understood it (1). And where A. had entered into an agreement with the owner of a piece of meadow at the end of a garden attached to a house tenanted by A., but which piece of meadow was in the occupation of B., that when the land so occupied by B. should be given up by him the owner would grant a lease of it to A., that it might be added to the garden at the end of the house so tenanted by A., but before the occupation was given up by B. (with whom A. was allowed to occupy the meadow), notice had been given by a railway company that they required a corner of the meadow for the purposes of the railway, and after possession had been taken by the company (without prejudice to a claim by A. under sect. 92 (2), to compel the company to purchase the whole of the house and premises) B.'s occupancy determined, and A. obtained a lease of the meadow; Vice-Chancellor Sir W. P. Wood held, that the meadow, to which A. had at the time of notice only a right to be acquired at a future time of annexing this meadow to his garden, but had not at the time actually acquired it, did not form "part of the house" within

"House" in sect. 92 is used there in its ordinary and legal, if not universal sense, in which the law understood it.

(1) *Grosvenor (Lord) v. Hampstead Junction Railw. Co.*, 1 De G. & J. 446; 3 Jur. (N. S.) 1085; 26 L. J. (Ch.) 731.

(2) Lands Clauses Consolidation Act.

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A company taking a manufactory is bound to take as part thereof the trade fixtures therein. The term "manufactory" in sect. 92, includes whatever are fixtures.

Under sect. 92 a landlord shall not be compelled to sell a part of his house, if before the company begin to exercise compulsory powers he gives notice to take the whole—a pending treaty for part does not prevent landowner requiring company to take the whole.

If railway company giving notice to take part of house or factory is required to take whole, company cannot take possession of the part without paying in under

the Lands Clauses Act, s. 92, at the time when the notice to treat was served; so that A. could not compel the company to purchase the whole of this house and premises (1). A company taking a manufactory is bound to take as part thereof the trade fixtures therein. If a tenant in exercising his trade puts up fixtures he is entitled to remove them, if he does so within the term, and the tenant of a house is also entitled to remove ornamental fixtures not connected with trade, they being considered built in merely for a temporary domestic purpose. And the term "manufactory" in sect. 92 (2) includes whatever are fixtures (3). The proper construction of sect. 92 of the 8 Vict. c. 18, which enacts that "no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house, or other building or manufactory, if such party be willing and able to sell and convey the whole," is, that a landlord shall not be compelled to sell a part of his house if before the company has begun to put their compulsory powers in motion, he gives them notice to take the whole. And a landowner, who, upon being served by a company with notice to treat for a part of his property, replies by claiming a given sum for the part, is not thereby precluded, if that sum is refused, from asserting his rights under that section to require the company to take the whole, the matter being still in treaty, and the company not having proceeded to act upon their compulsory powers (4). A wing of a hospital, joined to a main building by a wall only, but used for the like purposes as the main building, and the garden of the hospital, are parts of the house "or other building" forming the hospital within the meaning of the 8 Vict. c. 18, s. 92; although both wing and garden are modern additions to an ancient edifice; and therefore a railway company, proposing to take a part of such wing and garden, can be required by the trustees of the hospital to purchase the entire hospital (5). Where a railway company having, under 8 Vict. c. 18, given notice of their intention to take part of a house or factory, is required to

(1) *Chambers v. London, Chatham, and Dover Railw. Co.*, 11 W. R. 479.

(2) Lands Clauses Consolidation Act.

(3) *Gibson v. Hammersmith and City Railw. Co.*, 9 Jur. (N. S.) 221; 32 L. J. (Ch.) 337.

(4) *Gardner v. Charing Cross Railw. Co.*, 2 J. & H. 248; 10 W. R. 120.

(5) *St. Thomas's Hospital (Governors) v. Charing Cross Railw. Co.*, 1 J. & H. 400; 7 Jur. (N. S.) 256; 30 L. J. (Ch.) 395; 9 W. R. 411; 4 L. T. (N. S.) 13.

take the whole, it cannot take possession of the part it requires without paying into the bank, under sect. 85, the value of the whole which it is required to take (1). Where a railway company a short time before the expiration of the time limited by their Act for the compulsory purchase or taking of lands, had given a notice to treat for the purchase of the right or easement of making and for ever maintaining their railway by throwing a bridge over a yard belonging to a manufactory, and the owner, after the expiration of the company's compulsory powers, had given a counter notice under the 92nd section of the Lands Clauses Consolidation Act, 8 Vict. c. 18, requiring the company to take the whole of the manufactory; and the company did nothing upon the notice and counter notice for nearly twelve months, and they then gave a notice for the purchase of the whole manufactory, and proceeded to take steps for summoning a jury to assess its value; the Court of Appeal, affirming the decision of Vice-Chancellor Sir W. P. Wood, but upon different grounds, held, on an application by the owner for an injunction, that whether the original notice to treat was valid or not, the Court could not, after the counter notice which had been given by the landowner, and which created an equity in favour of the company's right to give their last notice, interfere with the proceedings of the company; this decision being, however, without prejudice to any steps which the owner might take at Law to stay or quash those proceedings (2). But Lord Chancellor Cranworth said that his impression was, that a notice to take an easement such as that in question was not a notice warranted by the Lands Clauses Consolidation Act; the word "hereditaments" used in the interpretation clause as a meaning of the word "lands," signifying corporeal hereditaments (hereditaments which may be the subject of tenure, which a right of way cannot be), and therefore not including a right of way (3). And the same judge was also of opinion that such a notice to treat as that above-mentioned did not confer on the owner a right to give a counter

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sect. 85 of
Lands Clauses
Consolidation
Act, value of
whole.

Notice to treat
for purchase
(here) of right
or easement
in, and counter
notice to take
the whole of
manufactory,
binding on
landowner
(here) after
twelve
months.

(1) *Giles v. London, Chatham, and Dover Railw. Co.*, 1 Dr. & Sm. 40; *Underwood v. Bedford and Cambridge Railw. Co.*, *Dadson v. East Kent Railw. Co.*, 7 Jur. (N. S.) 941.

(2) *Pinchin v. London and Blackwall Railw. Co.*, 5 De G. M. & G. 851; 1 Jur. (N. S.) 368; 24 L. J. (Ch.) 405.

(3) *Ib.*

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notice requiring the company to take the whole of the manufactory ; because, he thought, a right of way could not be considered as part of the manufactory ; but a right upon, in, and connected with the manufactory ; and the same judge said that his then impression was, that when a valid notice has been given, and a valid counter notice has been given, that that was a substitution of the counter notice for the original notice ; and that the notice and counter notice constitute one notice for the purpose of enabling the jury to assess the value of the property forming the subject matter of the amalgamated notices so constituting one notice (1) ; and that when a company has given a valid notice to take land, it is competent to the landowner to apply at once for a mandamus to compel the company to proceed (2) ; and that he did not think it lay in the plaintiff's mouth here to complain of any delay, the delay being as much their own as the delay of the company ; and Lord Justice Turner said, that the plaintiffs by their own conduct had created a counter equity against themselves by having given the notice that they were willing to sell ; that they had led the company into the position of carrying on the works upon the faith that they would complete that contract ; and, in his opinion, it was the bounden duty of the Court to put the plaintiffs upon the terms to sell the whole manufactory to the company ; and that that undertaking was properly imposed by the Vice-Chancellor, and that the effect of that undertaking was, in Equity, to bind them to sell and convey to the company (3). Upon the construction of the 18th, 21st, 23rd, and 92nd sections of the Lands Clauses Consolidation Act, 8 Vict. c. 18, after a notice under the 18th section to take part of a manufactory, and a counter notice under the 92nd section, it is not necessary that there should be a formal notice by the company, under the 18th section, before summoning a jury under the 23rd section ; but under the 21st section the company must give a reasonable opportunity to the landowner to agree with them before causing a jury to be summoned (4) ; and in this case it was held that the opportunity

(1) *Pinchin v. London and Blackwall Railw. Co.*, 5 De G. M. & G. 851 ; 1 Jur. (N.S.) 368 ; 24 L. J. (Ch.) 405.

(2) *Birmingham and Oxford Junction Railw. Co. v. The Queen*, 20 L. J. (Q.B.) 304.

(3) *Pinchin v. London and Blackwall Railw. Co.*, 5 De G. M. & G. 851 ; 1 Jur. (N.S.) 368 ; 24 L. J. (Ch.) 405.

(4) *Schwinge v. London and Blackwall Railw. Co.*, 3 Sm. & Giff. 30 ; 1 Jur. (N.S.) 368 ; 24 L. J. (Ch.) 405.

offered by a subsequent proposal to treat for the purchase of the whole was such a reasonable notice as justified the company giving a notice of summoning a jury (1). In this case, on the 30th of June, 1853, the L. and B. Railway Company had given the plaintiff notice that they should, under the provisions of their Acts for widening the railway, require the messuage in which he resided, and such portions of the yard as would be requisite for the sites of the piers, and for the right or easement of making and maintaining the widening over the intermediate spaces; on the 11th of July following the plaintiff gave the railway company notice under the 92nd section that he was willing and able to sell the whole, but declined to sell a part of his property; on the 27th of July, 1853, the compulsory powers of the company, which had been extended from 1849, expired; negotiations for a settlement of the terms having failed, nothing more was done by either party until the 2nd of November, 1854, when the railway company gave the plaintiff notice that they intended to issue their warrant to the sheriff for summoning a jury to assess the price or compensation to be paid to the plaintiff for the whole of his property. On a motion for an injunction to restrain the railway company from summoning a jury, from taking any proceedings at Law against the plaintiff, and from taking possession of the property, Vice-Chancellor Sir J. Stuart held, that as the railway company before the expiration of their compulsory powers gave notice to take part of the plaintiff's property, and as the plaintiff within the time limited gave notice to the company to take the whole of his property, it was not necessary that the company should, upon the construction of the Acts of Parliament, signify their assent to take the whole before the expiration of their compulsory powers; and, therefore, a letter written on the 9th of September, 1854, was a sufficient assent by the company of their disposition to treat for the purchase of the whole property; and that upon the authority of *Pinchin's Case*, that the effect of the counter notice to take the whole did not operate to destroy, but only to suspend the original notice to take a part of the property; and, *semble*, that the term of twenty-one days mentioned in the 21st section, and included in the original notice, does

(1) *Schwinge v. London and Blackwall Railw. Co.*, 3 Sm. & Giff. 30;

1 Jur. (N. S.) 368; 24 L. J. (Ch.) 405.

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Cottages
(here) part of
a manufactory.

Counter notice
to part with
whole (here)
by bill.

not apply to the case of a notice given under the 92nd section, to take the whole of the property ; and further, that as a fair opportunity to treat and agree upon a price for the property had been given to the plaintiff, and as the parties could not agree upon the amount of compensation, a jury might be resorted to by the railway company, and the motion was refused (1). But where, in 1847, the G. N. Railway Company had given notice to S. of their intention to take his dwelling-house and certain cottages, all separated from a manufactory carried on by S. only by a road ; which cottages were used as warehouses, and were the only warehouses used in connexion with the manufactory ; Vice-Chancellor Sir W. P. Wood held, that the cottages were part of the manufactory, and that the company could be compelled to take the whole manufactory (2) : but, *quære*, whether the dwelling-house also could have been considered as part of the works, so as that if the dwelling-house only had been taken for the railway works the company could have been compelled to take the whole also (3). The company, in this case, not having taken active steps on the notice of 1847, S. sued a mandamus to compel them, but did not prosecute it ; the compulsory powers of the Act of 1847 expired, and were renewed by an Act of 1852, under which the company again issued a new notice respecting the premises in question ; the plaintiff's solicitor afterwards verbally informed the defendant's solicitor at a casual meeting that the plaintiff wished to part with the whole, and not a part only, of the premises ; the company, afterwards, without communication with the plaintiff, procured their surveyor to be appointed by two justices under the Lands Clauses Consolidation Act, 1845, who valued that portion which they wished to take ; the company then paid that sum into Court, and executed a bond under the Lands Clauses Consolidation Act, and entered and commenced work ; the Vice-Chancellor held, that the plaintiff was entitled to give the defendants now, by his bill, notice of his intention to part with the whole and not a part only of the premises, and an injunction was granted accordingly, restraining the company from entering on the pre-

(1) *Schwinge v. London and Blackwall Railw. Co.*, 3 Sm. & Giff. 30 ; 1 Jur. (N. S.) 368 ; 24 L. J. (Ch.) 405.

(2) *Spackman v. The Great Western Railw. Co.*, 1 Jur. (N. S.) 790.

(3) 1b.

mises until the value should be properly ascertained (1). Where a company had given notice to take part of a manufactory, and were required to take the whole under the 92nd section of the Lands Clauses Consolidation Act, the Lords Justices held, that they could not escape from the necessity of so doing by changing their plan, and passing under the part comprised in their notice by a tunnel, whether such a proceeding would amount to taking a part of the manufactory or not; and Lord Cranworth said that he was inclined to the opinion that, suppose the manufactory was at the top of a hill, and you were burrowing under it at any depth, you would be taking part of the manufactory within the enactment, on the principle of the maxim, "*Cujus est solum, ejus est usque ad inferos.*" And where the construction of an Act of Parliament under which property is to be compulsorily taken is doubtful, it should be construed most favourably to those who seek to defend the property from innovation (2). The powers for the compulsory purchase and taking of lands referred to in the 123rd section of the Lands Clauses Consolidation Act, are powers given to the several promoters of the several special Acts in which that Act might be incorporated, and not several powers given to the promoters of each special Act; and this section of the Lands Clauses Consolidation Act refers to the powers given by the Act for the purchase and taking of land, and not to the powers thereby given for carrying into effect a purchase already made (3). Where the special Act of a railway company incorporated so much of the Lands Clauses Consolidation Act as was not inconsistent with it, and it also provided that such parts of the line as passed through a certain specified piece of land should be arched over, so as to afford to the owner a communication between severed portions; the Court held, that this provision was not inconsistent with, and therefore did not exclude, the operation of sect. 92 of the Lands Clauses Consolidation Act, which provides, that no party shall be required to sell part of a manufactory if he shall be able and

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Where a company has given notice to take part of manufactory, and is required to take the whole, the company cannot escape so doing by changing their plan.

Where construction of Act giving compulsory powers of taking property is doubtful, it should be construed most favourably to those defending the property.

(1) *Spackman v. The Great Western Railw. Co.*, 1 Jur. (N. S.) 790.

(2) *Sparrow v. Oxford, Worcester, and Wolverhampton Railw. Co.*, 2 De G. M. & G. 94.

(3) *Sparrow v. Oxford, Worcester, and Wolverhampton Railw. Co.*, 9 Hare, 436; 21 L. J. Ch. (N. S.) 731; 16 Jur. 703.

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Land included in same wall with tin-plate works, used for deposit of ashes from works, is part of a manufactory within sect. 92 of Lands Clauses Consolidation Act, though (here) separated by a road.

willing to sell the whole (1). And land included in the same wall with tin-plate works, and used for the deposit of ashes from the works, was held to be part of a manufactory within this section, although the two portions of the property were separated by a road, over which a stranger had a right of way (2). A manufactory sometimes worked, or in part worked, by water-power, had a reservoir which was supplied by a goit into which water was turned out of a natural river at some distance off; at the point where the goit commenced there was a weir in the river; there were shuttles for regulating the flow of water into the goit, and a mill-house for the occupation of a man whose duty it was to attend to the shuttles; a railway company gave notice to treat for certain parcels of land, including the weir, shuttle, mill-house, and parts of the bed of the river (which was included in the proprietor's lease, though not forming part of the manufactory) and of the goit; they proposed to pass over the shuttles, weir, mill-house, river, and goit, by bridges; Vice-Chancellor Sir G. M. Giffard held, that they were bound, under s. 92 of the Lands Clauses Consolidation Act, to take the whole manufactory (3).

This Court has, notwithstanding 17 & 18 Vict. c. 31, jurisdiction upon a bill complaining of a breach of an agreement by a railway company as to carrying goods.

9. A demurrer to a bill in Equity, alleging that a railway company having undertaken the duty of carrying goods as common carriers on behalf of the plaintiffs, who were also carriers, instead of delivering them to the plaintiffs, to whose care they were addressed at the station, claimed a right to carry them to the customers of the plaintiffs, was overruled with costs (4); and the 17 & 18 Vict. c. 31 (the Railway and Canal Traffic Act, 1854), which gives power to Courts of Common Law to grant the preventive remedy, does not, by giving a concurrent jurisdiction, abridge the jurisdiction of the Court of Chancery (5).

Company is bound to take trade fixtures under sect. 92 of Lands Clauses Consolidation Act,

10. Although fixtures may be trade fixtures, which the lessee can remove during the term, a company is bound to take them; and whatever a railway company is bound to take under sect. 92 of the Lands Clauses Consolidation Act, it must, in proceeding

(1) *Sparrow v. Oxford, Worcester, and Wolverhampton Railw. Co.*, 2 De G. M. & G. 94; 9 Hare, 436.

(2) *Ib.*

(3) *Furniss v. Midland Railw. Co.*,

L. R. 6 Eq. 473.

(4) *Bavendale v. West Midland Railw. Co.*, 3 Giff. 650; affirmed on appeal, 7 L. T. (N. S.) 297.

(5) *Ib.*

under sect. 85, cause to be valued, and pay the value into Court. So held in a case where a railway company had given notice to take part of a manufactory, but was required by the owner to take the whole, and a valuer, on behalf of the company, went to the manufactory, and without entering into it valued it at a specified sum, and that amount was paid into Court in the usual way; the company was then proceeding to take possession, and to issue its warrant to summon a jury, but the owner of the manufactory insisted that the valuation had not included certain fixtures upon the premises, such as a steam-engine, shaping and turning lathes, &c., and that the company, under sect. 92 of the Act, was bound to take such fixtures; the company contending that the fixtures being trade fixtures, and removeable by the owner, he could not compel the company to take them, but upon the owner filing a bill and moving for an injunction to restrain the company from taking or continuing in possession, or summoning a jury, until the purchase-money and compensation for the premises (including the fixtures) had been paid or deposited, Vice-Chancellor R. T. Kindersley granted the injunction (1).

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and cause to
be valued, and
pay value in,
under sect. 85.

11. A railway company is entitled to restrain an owner of land in a mining district from taking away any of the coal necessary for the security of a bridge, the abutments of which rest upon ground which the company has taken; and whether a grant is voluntary or compulsory, it must carry with it all that is necessary to the enjoyment of the subject-matter of it; and therefore, if a certain amount of lateral support is essential to the safety of the railway, the right to it must pass as a necessary incident to the grant. In this case the company had taken a piece of ground or strip of land, under which was a coal mine, which had been abandoned for forty years and upwards, and which was flooded with water nearly to the top of the shaft leading thereto, and a conveyance of the land had been made to the company, in 1834, under an Act of Parliament, which provided that all coal or other mineral should be deemed to be excepted out of any purchase of lands by the company, and might be worked by the owners and lessees thereof, so that no damage or obstruction was done or thereby occurred to or in such railway or other works, and in case of damage, reparation

Though conveyance be compulsory, the right of support passes as a necessary incident of property.

(1) *Gibson v. Hammersmith Railw. Co.*, 32 L. J. (Ch.) 337; 9 Jur. (N. S.) 221.

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A railway company is entitled, as a necessary incident to grant of land, to lateral support from adjacent land, to uphold a bridge, not within the twenty yards afforded by the Act.

was to be made by the owners or lessees; and whenever the working should approach within twenty yards of any masonry or building belonging to the company, notice was to be given to them, and they might deliver a declaration requiring the minerals under such masonry or building to be reserved for their protection, and in that case they should purchase the same; and in case they should not deliver such declaration, that the owners or lessees might work the minerals under the masonry or buildings in the usual and ordinary manner of working mines, doing no avoidable damage; and the land was taken for the purpose of building thereon a bridge of great weight, which was subsequently built by the company; and at the time of the purchase there was beneath the land, and a large tract of adjoining land belonging to the vendor, a mine which had been accidentally flooded, and had long previously been full of water; and in 1859 a lessee, deriving title under the vendor, threatened to drain the mine and renew the working; but it was held by the House of Lords, affirming a decision of Lord Chancellor Campbell and Vice-Chancellor Sir W. P. Wood, that, in addition to the special protection afforded by the Act in respect of workings within twenty yards' distance of any masonry or building, the company was entitled, by way of necessary incident to the grant of the land, to such lateral support from the adjacent land of the vendor, not situate within the twenty yards, as might be necessary to uphold the bridge and railway; and that the lessee was properly restrained from working minerals under the adjacent land not the property of the company and not within the limits of twenty yards, so as to affect the stability of the bridge; also that the circumstance that the conveyance of the land was compulsory and not voluntary, could not, in the absence of any special enactment, affect the construction of the conveyance, nor prevent it from passing to the company the necessary right of support as an ordinary legal incident. But it was held that although the water might afford additional support to the surface, the company had no right to speculate on the continuance of such an accidental circumstance, and that the company could not compel the lessee to keep the mine filled with water to the exclusion of any future workings, nor could he be restrained from withdrawing the water from the spaces left in the old workings, if such effect should be

produced by working the colliery in a proper manner (1). In similar cases to the foregoing, it being impracticable to define beforehand the limits within which the workings ought to be restrained, an injunction is properly expressed in general terms against working so as to produce the particular evil apprehended (2). And in *North Eastern Railway Company v. Crossland* (3) it was held that a railway company is entitled to the lateral vertical support of lands adjacent, and a perpetual injunction was granted by Vice-Chancellor Sir W. P. Wood (affirmed by the Lords Justices) to restrain the working for minerals, in the notice of the defendant stated to be within forty yards of the line and tunnel, in such a manner as to occasion damage to the railway or works by the abstraction of the minerals, and although the defendant would thereby be prevented from getting minerals of very great value. In this case a railway company, under the powers of their Act, had bought lands for the sole purpose of constructing a railway, and had also purchased, for trifling sums, from various landlords, the right of making a tunnel through their lands; and, under their Act, the minerals in or under the lands were excepted from the purchases, and the owners were enabled to work the minerals, so that no damage might be done to the railway, and the defendant, who derived his title as landowner from the vendors to the company, gave notice under the assumed powers of a subsequent Act of his intention to work for minerals, with the option to the company to purchase them, but the Court was of opinion that the subsequent Act was not applicable. And a company which has, by the terms of its purchase, precluded the owners of land from working minerals in a way injurious to its property, cannot, in the absence of statutory provision to that effect, be compelled to purchase those minerals of the owner (4). But the grant to a railway company under their Act and the Railway Acts, of the right to make, maintain, and use a tunnel, does not give the company such a right to support to their tunnel that the

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A railway company is entitled to the lateral vertical support of lands adjacent, and to restrain working of minerals occasioning damage to railway or works.

The grant to a railway company of the right to make a tunnel does not disentitle grantor work-

(1) *North Eastern Railw. Co. v. Elliott*, 32 L. J. (Ch.) 402; 9 Jur. (N. S.) 555; 1 J. & H. 145; 2 De G. F. & J. 423; *Elliott v. North Eastern Railw. Co.*, 10 H. L. C. 333.

(2) *Ib.*

(3) 32 L. J. (Ch.) 353; 2 J. & H. 565; 11 W. R. 83; 6 Jur. (N. S.) 817.

(4) *Ib.*

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ing under, &c., tunnel, and company cannot claim subjacent and adjacent support to tunnel, without making compensation.

A conveyance to a railway company, though gratuitous, gives, by implication, a right to all reasonable subjacent, adjacent, and lateral support.

And although the minerals are reserved they cannot be worked even under grantor's land in a way calculated to endanger the railway. Owner of house conveying upper storey, reserving all below, purchaser has a right to prevent damage to wall underneath.

grantor, acting duly in accordance with the Railways Clauses Act, ss. 77, 78, cannot work and have the benefit of mines under and adjacent to the tunnel; and an owner of land granting to a railway company the right to make and maintain a tunnel through his land is in the same position with respect to his right to work mines under these two sections of the Railways Clauses Act as if the company had actually purchased the land, and the rule that a grantor cannot derogate from his own grant does not apply; and Vice-Chancellor Sir W. P. Wood dismissed a bill by a railway company claiming sufficient subjacent and adjacent support to the tunnel and railway from the seams of coal and strata without making compensation for the same, and praying an injunction accordingly (1). But a conveyance—though, as in the case of *Caledonian Railway Company v. Belhaven* (2), gratuitous—of land to a railway company for the purposes of the line gives a right by implication to, and an implied obligation is contracted to afford all reasonable subjacent and adjacent and lateral support connected with the subject-matter of the conveyance and necessary for the maintenance of the railway, though such obligation is limited by the condition of the land at the time of the grant or conveyance.

And, therefore, although in the conveyance to the railway company the minerals are reserved to the grantor and his heirs, with (as in the *Caledonian Railway Company v. Belhaven* (3)) full liberty to dig, search for, work, and carry away the same, so as the same be done without entering upon or breaking the surface of the land thereby granted, the grantor is not entitled to work them, even under his own land, in any manner calculated to endanger the railway (4). On the same principle, if an owner of a house conveys the upper storey, reserving all below, the purchaser will be entitled, on general principles, without stipulation, to prevent any damage to the walls underneath (5). But if I grant a meadow to A. for grazing purposes, retaining the minerals and the adjacent land, and if A., having no

(1) *London and North Western Railw. Co. v. Ackroyd*, 31 L. J. (Ch.) 588; 8 Jur. (N. S.) 911.

(2) *Infra*.

(3) *Infra*.

(4) *Caledonian Railw. Co. v. Sprot*,

2 Macq. 449; S. C. sub nom., *Caledonian Railw. Co. and the Glasgow, G., and C. Railw. Co. v. Sprot*, 2 Jur. (N. S.) 623; *Caledonian Railw. Co. v. Belhaven* (Lord), 3 Macq. 56.

(5) *Ib*.

warranty against subsidence, thinks fit to build a house on the edge of the meadow, and the house falls, he is without remedy against me, and has himself alone to blame for the consequences. If, however, the grant were made expressly for building purposes, there would be then an implied warranty of support, both subjacent and adjacent; and in case of a grant to a railway company for the purposes of the railway, if the line which divides the land granted from the land retained traverses a quarry, it may be that no adjacent support is necessary, and that the grantor may dig or remove the whole contiguous soil; but if the dividing line traverse a bog or bed of sand, it will be incumbent on the grantor to leave untouched such an intervening measure of lateral support as will prevent any part of the land granted from retreating (1). Subsequently to the conveyance several Acts of Parliament passed giving further powers to the company, and providing for cases of dispute with the landed proprietors as to the value of land, for purchase, mines, &c.; the defendant continued to work out his minerals until he received notice from the company that his works were of a nature to endanger the line; and it was also held, that the subsequent Acts of Parliament were not retrospective, and could not alter the effect of the previous bargain and conveyance (2). In this case S. had, in 1834, sold to a railway company land over which the railway was to pass, but by the same deed had stipulated in these terms, "reserving always to me and my heirs and successors the whole mines and minerals, of whatsoever description, within the lands conveyed, and full power and liberty to us, or any person or persons authorized by us, to search for, work, win, and carry away the same, and to make aqueducts, levels," &c.; and upon a suit to try the question, the House of Lords, upon the above principles, reversed the judgment of the Court below (3).

12. Where an existing railway company had obtained parliamentary powers to make some extensions and new works on their line, and to raise new capital for the works authorized by the Act and the general purposes of the undertaking, and the 8 Vict. c. 18

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No implied warranty of support upon grant of a meadow for grazing purposes; otherwise if for building purposes.

If the dividing line between lands granted and retained traverse a bog or bed of sand, the grantor must leave sufficient intervening lateral support as will prevent land granted from retreating.

Raising the prescribed capital not necessary (here) as condition pre-

(1) *Caledonian Railw. Co. v. Sprot*, 2 Macq. 449; S. C. *sub. nom. Caledonian Railw. Co. and the Glasgow, G., and C. Railw. Co. v. Sprot*, 2 Jur. (N. S.) 623

Caledonian Railw. Co. v. Belhaven (Lord), 3 Macq. 56.

(2) *Ib.*

(3) *Ib.*

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cedent to
taking land
compulsorily.

Upon an
agreement
between two
railway com-
panies, con-
taining clauses
beyond powers
of directors of
one company,
and arbitra-
tion clauses,
Court will at
suit of share-
holder of that
company re-
strain both
from proceed-
ing to arbitra-
tion in respect
of alleged
breaches.

A company
cannot agree
to do an act
within its
powers, as
part of a
series of acts
to work out
an illegal
agreement.

(the Lands Clauses Consolidation Act), had been incorporated with the private Act, "save so far as the clauses and provisions thereof respectively were expressly varied or excepted" by the Act; the Master of the Rolls, Sir J. Romilly, held, that the 16th section (which requires the whole of the capital to be subscribed before the compulsory powers of taking land is put in force, of which, under the 17th section of the Act, a certificate must be obtained from two justices) of the 8 Vict. c. 18, was inapplicable, and that the raising the prescribed capital, as provided by the Act, was not necessary as a condition precedent to the taking of land compulsorily (1)

13. Where an agreement made between two railway companies under their common seals contains clauses which are beyond the powers of the directors of one of the companies, and clauses for referring to arbitration all disputes arising under the agreement, this Court will, at the suit of a shareholder of that company, restrain both companies from proceeding to arbitration in respect of alleged breaches of those clauses. But no such injunction will be granted at the suit of a shareholder of the other company, on the ground that the stipulations of any such clause are beyond the powers of the directors of the company in which the plaintiff is not a shareholder; and an agreement by a railway company to contribute towards the parliamentary deposit required for bills promoted by another company is *ultra vires*; so also is an agreement to take shares in future extensions of another company; so also is an agreement to make traffic regulations applicable to future extensions; but no such agreement is *ultra vires* if its validity is expressly made to depend on the sanction of Parliament (2). And although a company may do a certain act independently, that company is not to agree to do that act as part of a series and collection of acts to be done for the purpose of working out an illegal agreement. And where a bill was filed on behalf of the plaintiff and all other the shareholders of one of the companies to impeach the validity of an agreement entered into between that and another railway company for making a lease of one line to the

(1) *Weld v. London and South Western Railw. Co.*, 32 Beav. 340; 9 Jur. (N. S.) 510.

(2) *Maunsell v. Midland Great Western Railw. (of Ireland) Co.*, 1 H. & M. 130.

other company, on the ground that some of the terms of the agreement were *ultra vires*, and could not be carried out without the assistance of Parliament; and it was contended that the agreement did not stipulate to do the things therein contracted to be done, except so far as they could now or at a future time do them when sanctioned by Parliament; Vice-Chancellor Sir R. T. Kindersley held, that the agreement was illegal, and the object of the agreement *ultra vires*; that the plaintiff was entitled to an injunction to restrain those acts which the companies could do as well as those they could not do, all being component parts of the same illegal agreement; and that the parties had no right by virtue of that agreement, until they had obtained the authority of Parliament, to do even those acts which, independently of the agreement, they did not require the authority of Parliament to do. But the Court, in granting an injunction to this extent, refused to restrain two directors, appointed under the agreement, from acting, on the ground that the shareholders had power to remove them, and that their removal might be detrimental to the business of the company (1). And a single shareholder of a company may apply for and obtain an injunction to restrain the company from committing an act beyond their powers (2). And where a resolution had been passed by the shareholders of a company authorizing acts partly within and partly beyond their powers, such acts being distinct, and capable of being carried out alone; Vice-Chancellor Sir W. P. Wood held, that a shareholder was not bound to apply for an injunction to restrain the company from exceeding their powers until he became aware that an attempt was being made to carry out the illegal portion of the resolution (3). And the Court, finding two railway companies had entered into two illegal agreements for an amalgamation, and, after a bill filed, had entered into a third in the place of the others with the intent of carrying out the same object as far as the law would allow, restrained the companies upon an interlocutory application, and, without giving an opinion upon the validity of the third agree-

A single shareholder may restrain a company from acting beyond its powers.

(1) *Hattersley v. Shelburne (Earl)*, 10 W. R. 881; 31 L. J. (Ch.) 873; (2) *Charlton v. Newcastle and Carlisle Railw. Co., and North Eastern Railw. Co.*, 5 Jur. (N. S.) 1096.¹

(3) *Ib.*

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An agreement between two railway companies to work together and to share profits according to a certain percentage, is *ultra vires*.

Railway company having, under an Act, purchased a canal, has power to take a lease of another canal.

The funds of a company cannot be applied to obtain an Act to extend the business beyond objects for which company constituted.

The principles governing cases where application of funds *ultra vires* are restrained, are the same in large companies and ordinary partnerships.

An agreement by which one railway company is to allow another to work lines, &c., and use plant, &c., for

ment, from carrying out the illegal amalgamation (1). And an agreement between two railway companies that they shall work together, and that the profits shall be shared so as to give a certain percentage to each, is beyond the powers of the companies, and illegal (2). But where a railway company had obtained an Act enabling them to purchase a canal, and to exercise all the "rights, powers, and privileges" of the canal company, the Court held, that after the purchase the railway company had authority to take a lease of another canal under the 8 & 9 Vict. c. 42 (an Act to enable canal companies to become carriers upon their canals), which enables canal companies to make leases of their tolls, &c., this being a "right, power, and privilege" possessed by the first canal, which passed, on its sale, to the railway company; and a motion by a shareholder of the railway company for an injunction to restrain the taking a lease of the latter canal, under the 8th section of the above Act, as *ultra vires*, was refused (3). It is not lawful to apply the funds of a company in an application to Parliament for powers to extend the business of the company beyond the objects for which it was constituted, and the Court will interfere by injunction at the suit of a shareholder to restrain any such application (4). And it is well settled that the principles which are to govern in cases of the nature of this case of *Simpson v. Denison* (namely, one in which the Court was called upon to restrain the application of the funds to objects not included in the constitution of the company) between the members of large companies are the same as those which regulate the rights in ordinary partnerships. Where heads of a proposed agreement had been arranged between the directors of two railway companies, by which one company was to allow the other company for ninety-nine years to work the lines, and use the property and plant of the granting company, except certain specified lands and buildings, upon certain terms of allowance for working expenses and charges, and the maintenance of works and ways, the property and plant to be

(1) *Charlton v. Newcastle and Cumbria Railw. Co. and North Eastern Railw. Co.*, 5 Jur. (N. S.) 1096.

(2) *Ib.*

(3) *Rogers v. Oxford, Worcester, and Wolverhampton Railw. Co.*, 25 Beav.

322; 2 De G. & J. 662; v. 21 & 22 Vict. c. 75, s. 3.

(4) *Simpson v. Denison*, 10 Hare, 51; v. *Winch v. Birkenhead, Lancashire and Cheshire Junction Railw. Co.*, 5 De G. & Sm. 562; *post*, p. 801.

restored on the termination of the agreement, on terms of profitable return to the granting company; and provision was made for application to Parliament for powers, if needful; on a bill by a shareholder in the granting company, on behalf of himself and all other the shareholders in that company, except the directors, against that company and the other company, the Court held, that the proposed agreement was a delegation of some of the statutory powers of one of the companies to the other, which was contrary to the policy of their Acts, and could neither be granted nor accepted without further powers from Parliament; that it was a contract savouring of illegality, which, at the suit of any shareholder, this Court would restrain; and the Court, on motion, restrained the company from perfecting the agreement, and held that such an agreement is not distinguishable on principle from a lease, to grant which, is clearly not within the statutory powers of the granting company; and that the 87th section of the Lands Clauses Consolidation Act merely gives to one company a limited power to run a portion of its traffic only when it is necessary for the purpose of its own traffic over the line of another railway company; but that an agreement for an application to Parliament for powers necessary to enter into the above terms, and upon a stipulation that they should not be acted upon until the necessary powers should have been obtained, would be lawful, and would not be restrained (1); and that the suit being by one shareholder on behalf of himself and the other shareholders in the granting company against that company and the other company proposing to enter into an illegal agreement, without making any directors or other persons parties, seeking an injunction against the granting company to restrain them from perfecting the agreement, was properly framed (2). Where it appeared very probable that, at the time of filing the bill, a company, which was authorized to make 150 miles of railway, intended to complete twenty-three miles only, and then abandon the rest; and, upon a motion to restrain the company from constructing a part only of its line, it appeared that the company had since abandoned the whole; the

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ninty-nine years, savours of illegality, and the perfecting thereof will be restrained.

To grant a lease is clearly not within statutory powers;

but an agreement to apply to Parliament for powers to enter into such terms, and a stipulation that they shall not be acted upon until powers obtained, is lawful.

The Court will restrain a company from constructing a part only of line with intention of abandoning the rest.

(1) *v. Simpson v. Denison*, 10 Hare, 51; *ante*, p. 800. *shire, and Cheshire Junction Railw. Co.*, 5 De G. & Sm. 562.

(2) *Winch v. Birkenhead, Lanca-*

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The Court will interfere when it sees the whole undertaking cannot be completed.

The obligation to complete a railway is co-extensive with the authority to make it.

Master of the Rolls, Lord Langdale, was of opinion that if the case had remained as it was at the time of the filing of the bill, the plaintiff would have been entitled to the injunction; but refused it, on the ground that the alteration in the existing circumstances made it unnecessary and improper; but that if the works were resumed, the plaintiff must have liberty to apply; but gave no costs of the motion (1). The powers contained in Railway Acts are given only in contemplation of the supposed public good by completion of the whole works, and the Court will interfere when it sees that the whole undertaking cannot be completed. And a railway is not like a partnership for general trading purposes, in which one portion of the business may be abandoned, but it is a partnership for a public purpose for effecting a work which it is a duty to complete, and the obligation to complete the work is co-extensive with the authority to make it. Therefore, where a railway company, authorized to make a line of fifty-six miles, resolved on making only four miles of it, and to abandon the rest, the Court, at the suit of an individual shareholder, held, that such a resolution was illegal, both as against the landowners on the line and the shareholders in the company, and granted an injunction restraining the company from making the limited portion only, or otherwise than with the view and purpose of completing the whole (2). And where a company were authorized by three several Acts to make three several railways, and raise three several sums for that purpose, and a subsequent Act declared that the company mentioned in the three several Acts were, and ever had been, the same, and not separate and distinct companies, and shares were issued for raising the whole capital for the three undertakings, without distinction, and calls were made; the Master of the Rolls, Lord Langdale, held, upon demurrer, that the company had no right to apply the funds in making one only of the railways, abandoning the others; but that a clear allegation, not only of the abandonment, but that the directors intended so to misapply the funds in making a part only, was necessary to support a bill to prevent it, and upon that ground allowed the demurrer, but gave

(1) *Logan v. Earl Courtown*, 13 Beav. 125, 138; 5 Railw. Cas. 741, 758; 22; 20 L. J. (Ch.) 347. 1 Mac. & G. 481; 1 H. & T. 554.

(2) *Cohen v. Wilkinson*, 12 Beav.

liberty to amend; and the bill having been amended, the Court, upon motion, granted an injunction to restrain the company and directors from applying any moneys except for the purpose of the construction of the whole railway authorized by the three Acts, but refused to make any order as to future calls, or to prevent the company paying the debts contracted before the date of the motion, and the current expenses of maintaining and working the line (1).

Where a railway company has formed a portion of the line, but is unable to complete the whole, the Court exercises a discretion in granting an injunction, the effect of which will be to prevent that portion being made effective and beneficial to the public, and profitable to the shareholders (2). Where a railway has undertaken to complete a line, or any series of lines, they are bound to complete the whole line or series of lines, and are not, without parliamentary authority, at liberty to abandon any portion of their undertaking (3). But an injunction by the Master of the Rolls, Lord Langdale, restraining the construction of part only of the line was dissolved by Lord Chancellor Cottenham on the ground of acquiescence on the part of the plaintiff, and that the other shareholders had for eighteen months previously to filing the bill known, or had had the means of knowing, the acts complained of (4). And the Master of the Rolls held, that existing contracts for making part of the line were no answer to an application to prevent a railway company from making a portion of the line with an intention of completing less than the whole, and said that a case might arise in which the Court would not be disposed to act in a severe and strict manner if by a small expenditure a great benefit might result to the shareholders, and a considerable advantage to the public (5). Although the Court will in a proper case exercise its jurisdiction by injunction, touching proceeding in Parliament for a private bill, or a bill respecting property, yet it has no power to interfere to deprive a party of the right of applying to Parliament for a special law to supersede the rules of property

Where railway company has formed portion of line, but is unable to complete the whole, Court exercises discretion—as regards the public benefit and shareholders' profits—in granting an injunction.

But acquiescence by plaintiff and knowledge by the other shareholders, disentitles to injunction to restrain construction of part only of line.

The Court has no power to restrain application to Parliament for a special law to supersede the rules of property by

(1) *Hodgson v. Earl Powis*, 12 Beav. 392, 529.

(2) *Hodgson v. Earl Powis*, 12 Beav. 529; 19 L. J. (N. S.) Ch. 356.

(3) *Graham v. Birkenhead, Lancashire, and Cheshire Junction Railw. Co.*

shire, and Cheshire Junction Railw. Co. 12 Beav. 460.

(4) S. C. 2 Mac. & G. 146; 2 H. & T. 450.

(5) S. C. 12 Beav. 460, 469.

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which a party finds himself bound, and the Court will not restrain an application of a company finding itself unable to carry out its contract to complete line in a particular manner.

The jurisdiction to restrain individuals applying to Parliament for a private Act is undoubted, but it is difficult to conceive when it would be granted.

by which he finds himself bound, whether arising from contract or otherwise. And where a party agreed with a railway company to withdraw his opposition to their bill in Parliament in consideration of their completing their line in a particular manner, and the company, finding themselves unable to carry out their contract, gave notice of an intention to apply to Parliament for authority to abandon their scheme, Lord Chancellor Cottenham dissolved an injunction granted by the Vice-Chancellor of England at the suit of the party with whom the company had contracted, restraining the company from making the application (1). The jurisdiction of the Court of Chancery to restrain individuals from applying to Parliament for a private Act is undoubted, but all the authorities are agreed that it is difficult to conceive a case in which such an injunction would be granted (2). And an injunction granted by a Vice-Chancellor to restrain the directors of the London, Chatham, and Dover Railway Company, appointed under the Companies Arrangement Act, 1867, from further promoting in Parliament a bill which had passed through the Commons, and had been read a first time in the Lords, for referring the affairs of the company to arbitration, was, on appeal, dissolved (3). And an order that the directors of the company should pay into Court moneys in their hands which had arisen from the tolls of the company was also, on the appeal, discharged (4). And though it is clear that the Court of Chancery, by means of its jurisdiction *in personam*, can restrain an application to Parliament for a private Act, it is almost impossible to conceive a case in which that jurisdiction would be exercised (5); accordingly, where Vice-Chancellor Sir J. Stuart had restrained the directors (appointed under the provisions of a special Act) of the above-named company from further promoting the above bill in Parliament, the bill having been, before it was introduced into the House of Commons, approved by general meetings of the shareholders and mortgagees of the company, though very much altered in its progress through the House of Commons; on

(1) *Heathcote v. North Staffordshire Railw. Co.*, 2 Mac. & G. 100; 2 H. & T. 382; 6 Railw. Cas. 358.

(2) *London, Chatham, and Dover Railw. Co., Ex parte*, 20 L. T. (N. S.) 718.

(3) *Ib.*

(4) *Ib.*

(5) *Hartridge, Ex parte; London, Chatham, and Dover Railw. Co., Ex parte*, 17 W. R. 946; 20 L. T. (N. S.) 718.

appeal the injunction was dissolved (1). It is unauthorized and improper for railway companies to embark their funds in other railway undertakings, and they have no right to engage or pledge their funds, or entangle their affairs, in unauthorized transactions, upon a speculation that they may obtain parliamentary authority for doing acts which are beyond their powers at the time when they are done (2). But in this case the Court, upon motion, refused to restrain a company from declaring a forfeiture of shares by reason of the non-payment of calls, alleged to be made for illegal purposes; although it appeared that the directors had conducted the proceedings in many particulars in a very improper manner, and so as to afford strong ground for complaint on the part of the shareholders; it being sworn that money was wanted to satisfy legal existing obligations of the company, and it being denied that the company sought to enforce the calls for illegal purposes. Upon a bill by the Great Northern Railway Company for an injunction to restrain the Eastern Counties Railway Company from obstructing the passage of the engines, carriages, and trucks of the Great Northern Railway Company to and fro over the junction of the East Anglian Railway with the Eastern Counties Railway, near W., and from doing any act whereby the Great Northern Railway Company might be hindered or obstructed in passing freely to and fro between the Eastern Counties Railway, near W., and the East Anglian Railway, Vice-Chancellor Sir G. J. Turner, upon a motion for an injunction, held, that an agreement between two railway companies, made without the authority of the Legislature, whereby one company delegates to another all the powers which have been conferred on it by Parliament, is an unlawful attempt to effect that which Parliament alone can authorize, and is against public policy, and in such a case it is the duty of the Court to withhold its interference when called upon to act in aid of such agreements (3). The Vice-Chancellor said he thought the one railway company, the Eastern Counties, having

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A railway company has no authority to embark its funds in other railway undertakings, nor upon a speculation that they may obtain parliamentary sanction.

An agreement between two railway companies by which one delegates to the other all its parliamentary powers, is unlawful and against public policy.

(1) *Hartridge, Ex parte; London, Chatham, and Dover Railw. Co., Ex parte*, 17 W. R. 946; 20 L. T. (N. S.) 718.

Beav. 22; 20 L. J. (Ch.) 347.

(3) *Great Northern Railw. Co. v. Eastern Counties Railw. Co.*, 9 Hare, 306.

(2) *Logan v. Earl Courtown*, 13

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Companies possessed of funds for objects distinctly defined by Act, will not be allowed to apply them to any other purpose whatever.

Injunction granted to restrain a railway company applying funds to support a bill for improving a river.

granted to the other the use of their lines, and of all the conveniences upon the lines, could not object to their grantees using the conveniences granted for any purposes for which they might be able to apply them, although they might not themselves be entitled to use them for such purposes (1). And in *Munt v. Shrewsbury and Chester Railway Company* (2) the Master of the Rolls, Lord Langdale, said that it had been absolutely, and then unalterably, decided in the Court of Chancery that companies who are possessed of funds for objects which are distinctly defined by Act of Parliament cannot be allowed to apply them to any other purpose whatever, however advantageous or profitable that purpose may appear to be to the company or to the individual members of the company. In this case a railway communicated with a river, upon the banks of which the company were empowered to erect wharves, &c., and take tolls; and the navigation of the river having become deteriorated, the company were about to support a bill for improving it; but the Court granted an injunction to restrain the application of the funds of the company towards that object. And where in a railway company there were two classes of shareholders, and a general meeting authorized the directors to apply to Parliament for an Act which would very materially alter the existing rights and interests of the two classes *inter se*; though the Master of the Rolls, Lord Langdale, held, that such an application to Parliament was not a breach of trust or duty to the company, and that to hold otherwise would be applying too strictly to a railway company the principles admitted to be applicable to private partnerships resting on private contracts unconnected with public duties and interests, and capable of dissolution; and upon the application of a shareholder of one of such two classes for an injunction to restrain the application to Parliament, and the use of the name and corporate seal, and the application of the corporate funds for that purpose, refused to restrain the application to Parliament, or the use of the corporate seal for that purpose; yet he restrained the application of the then present funds and the moneys of the company towards the payment of the costs. Lord Langdale said those (the then present) funds consisted of moneys

(1) *Great Northern Railw. Co. v. Eastern Counties Railw. Co.*, 9 Hare, 306, 310.

(2) 13 Beav. 1.

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paid or subscribed for the general purpose of the company for purposes in which all the shareholders were interested according to the contracts then subsisting between them, and which it was beyond the powers of the company itself to alter or modify; and that he thought it reasonable and within the jurisdiction of the Court, until legal authority was obtained, to restrain the defendants from applying the funds or moneys of the company in or towards payment of the costs of so much of the bill as proposed to effect the scheme for the commutation of the privileges attached to one of the classes (1). Where the directors of a railway company, for the purpose of increasing the traffic, proposed to guarantee certain profits, and secure the capital of an intended steam-packet company which was to act in connection with the railway, the Master of the Rolls, Lord Langdale, held, first, that such a transaction was not within their powers, and restrained the company by injunction; and, secondly, that in such a case one of the shareholders in the railway company was entitled to sue "on behalf of himself and all the other shareholders, except the directors," who were defendants, although some of the shareholders had taken shares in the steam-packet company (2). A railway company is bound to apply all its moneys and property for the purposes directed and provided for by the Act of Parliament, and not for any other purpose whatever, and any application of or dealing with the capital, funds, or money in any manner not distinctly authorized by the Act, is illegal. And where directors, for purposes not authorized by the Act, are proceeding to involve the company or shareholders in liabilities to which they never consented, relief may and ought to be given in this Court (3). And where a railway company became lawfully possessed of shares in another independent railway company, the Master of the Rolls, Lord Langdale, held, on demurrer, that, having no authority to do so by their Act of Parliament, they could not legally, as against one dissentient shareholder, increase their number of such shares, or apply their funds for the support of the second company (4). Although the

The Court restrained the application of the funds of a company towards payment of the costs of so much of a bill as proposed a commutation of the privileges of one of two classes of shareholders.

The Court restrained the carrying out an agreement by a railway company guaranteeing profits and securing capital of an intended steam-packet company.

A railway company lawfully possessed of shares in another railway company, cannot increase the number nor apply their funds for support of that other company.

(1) *Stevens v. South Devon Railw. Co.*, 13 Beav. 48. (2) *Colman v. Eastern Counties Railw. Co.*, 10 Beav. 1.

(3) *Salomons v. Laing*, 12 Beav. 339; 6 Railw. Cas. 289, 303. (4) *Ib.*

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The Court restrained railway company paying future dividends contrary to an Act, but not (here) past dividends.

A company will not be allowed to deviate from the plans, &c., specifying span, &c., of a railway bridge over turnpike-road.

Court will not interfere with a company merely because a particular act has been done in an informal way, which may afterwards be legally set right by them, the rule does not apply to cases of misapplication of funds which could not, under any circumstances, be rendered legal; and the Court overruled a demurrer for want of equity to a bill charging the misapplication by a railway company of money raised to purchase an authorized line, in the purchase of an unauthorized line, and seeking to restrain it (1). On a bill filed by a shareholder on behalf of himself and all the other shareholders, except the defendants, against the company and directors to restrain a railway company from paying any dividend either declared or to be declared, contrary to the provisions of an Act of Parliament, the Court granted an injunction as to future dividends, but, varying a decision of the Master of the Rolls, Lord Langdale, so far as respected past dividends, refused an injunction as to a dividend declared; on the ground that the plaintiff shewed no title to share in such dividend, and that the general body of the shareholders, who were interested in the dividend, were not adequately represented (2).

14. Where plans and sections deposited by the promoters with the clerk of the peace specify the span and height of a bridge by which a railway is to be carried over a turnpike road, the company will not, in the construction of the bridge, be allowed to deviate from the plans and sections (3). And where a railway company, with whose Act the Railways Clauses Act, 1845, was incorporated, by their deposited plans and sections proposed to build over a turnpike road an arch of a span of forty-five feet; and the company afterwards proposed to the trustees of the road to vary their plans, and to build a bridge of a span of thirty-five feet, but the proposal was rejected; and subsequently the company's agents commenced the erection of a bridge of the lesser span, and thereupon one of the trustees filed an information for an injunction, and the Lords Justices, affirming a decision of Vice-Chancellor Sir J. Stuart,

(1) *Bagshaw v. Eastern Union Railw. Co.*, 2 H. & T. 201; 2 Mac. & G. 389; 6 Railw. Cas. 169; 7 Hare, 114; 6 Railw. Cas. 152.

(2) *Carlisle v. South Eastern Railw. Co.*, 1 Mac. & G. 689; 1 H. & T. 366;

6 Railw. Cas. 670; 13 Beav. 295.

(3) *Att.-Gen. v. Tewkesbury and Great Malvern Railw. Co.*, 4 Giff. 333; 1 De G. J. & S. 423; 9 Jur. (N. S.) 618, 951.

held, that under the Railways Clauses Act, 1845, s. 13, which enacts that where it is intended to convey the railway on an arch as marked on the plan, "the same shall be made accordingly," the word "accordingly" meant according to the deposited plans and sections; and that the company was bound to erect the bridge according to the plans which had been deposited; and, *per* Lord Justice Turner, a bridge forming part of the line of railway itself is an engineering work within sect. 14 of the same Act, and the company was by that section debarred from making it otherwise than according to the description in the plan (1). And where a company in the first instance had obtained a conveyance on certain conditions as to the width of a bridge, the House of Lords held, that the company was bound not to depart from those conditions, and that a company claiming under the first company was equally bound, it being part of the consideration to maintain the bridge of the height and width originally fixed (2). In this case a railway company had obtained, for the purposes of the railway, a conveyance of land from C., and in the conveyance the company bound themselves to erect and maintain a bridge over the road leading to C.'s property, which was to be, according to the plans, thirty-five feet wide, and leaving a road under it of fifteen feet wide; this bridge was afterwards made, but the company, some years later, amalgamated with the H. Company, and the latter company's Act authorized a junction with the former railway at a point near this bridge; and the two companies then agreed as to the mode of effecting the junction; and part of the plan was to widen the arch or bridge over C.'s road, so as to extend the bridge from thirty-five to fifty-five feet wide, thereby darkening the road beneath; but C. obtained an injunction to restrain the company from carrying out this plan. But where the Court held that the soil of the road was only vested in a board of works upon a dry legal title, unaccompanied by the beneficial enjoyment, to promote the public convenience and prevent the incursion of strangers, and that the public convenience required the widening of a bridge, and that the only obstruction that would occur would be whilst the works were in progress, and

(1) *Att.-Gen. v. Tewkesbury and Great Malvern Railw. Co.*, 1 De G. J. & Sm. 423; 9 Jur (N. S.) 4 Giff. 333; 618, 951.

(2) *Edinburgh and Glasgow Railw. Co. v. Campbell*, 9 L. T. (N. S.) 157.

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that the road would not be ultimately narrowed, it decided that it was not a case for the extraordinary interference of this Court (1). In this case where a railway company, having formed their line, had obtained an Act for an extension for three years of their compulsory powers to take land, the preamble stating that it was for the convenience and safety of the public, and the company were owners of the soil on both sides of a lane crossed by a bridge, and therefore, like other owners, owners of the soil of the lane; but, by a subsequent Act, the soil of all roads was vested in the district board of works in whose district such roads were situate; and after the expiration of the three years the company found it necessary to widen the bridge over the lane, and claimed power to do so—notwithstanding that the board of works for the district denied such power—and proceeded to widen the bridge, but only in the same line of abutment, the road itself not being narrowed, but the soil was necessarily disturbed to form such addition; Vice-Chancellor Sir R. T. Kindersley refused, with costs, the board an injunction to restrain such widening, the company being put under no undertaking. In a contract between a railway company and a proprietor of land to be crossed by the line of railway, the Railways Clauses Act (8 Vict. c. 20) should be expressly referred to, if the company intend to claim the benefit of its provisions; and therefore where a company contracted “to provide and erect a suitable bridge over a street (marked in a plan referred to in the deed) as then planned and intended,” and the plan shewed that the street was intended to be forty-two feet wide, the Court held, that in the absence of any reference in the deed to the Railways Clauses Act the company was not at liberty to narrow the street to the dimensions specified in sect. 49 of that Act (twenty-five feet), but must make a bridge with an arch of the full width of the street (forty-two feet) (2). In *Att.-Gen. v. Dorset Railway Company* (3) upon an information and bill, at the relation and suit of H. H., on behalf of the road trustees, praying that the defendants might be restrained from impeding the course of an old road and from continuing a bridge,

In a contract between a railway company and a proprietor of land to be crossed, the Railways Clauses Act should be expressly referred to, if company intend to claim the benefit of its provisions—company bound (here) to make bridge full width of street.

(1) *Board of Works for Wandsworth v. London and South Western Railw. Co.*, 8 Jur. (N. S.) 691; 10 W. R. 814.
(2) *Clarke v. Manchester, Sheffield, and Lincolnshire Railw. Co.*, 1 J. & H. 631.

(3) 9 W. R. 189.

and other works as obstructions thereto, and from in any way interfering with the public traffic thereon, and from preventing its being as convenient for public traffic as it was before the said works commenced, and that the company might be ordered to restore the old road, and to make good all damage done thereto, and to make it in every respect as convenient for public traffic as it was before their said works were commenced; Vice-Chancellor Sir J. Stuart granted an injunction until further order, restraining the company from proceeding with the works. In this case, by the plans and sections deposited by the company, it appeared that they intended to carry the railway across a public road by means of a skew bridge, but instead of doing so, the company diverted the road for some distance, and afterwards restored it to its former course by a bridge which crossed the railway at right angles, thus causing two abrupt and dangerous curves; and the Court directed that in the meanwhile a competent person should inquire and report whether any deviation was necessary, and if so, how it could most conveniently be effected. Where a railway company had power by their Act to cross a river, the property of certain persons, by the erection of a viaduct; and by a clause to protect the proprietors of the river it was enacted that between certain points the works incident to the construction of the railway should be made under the direction of the proprietors, and according to plans to be submitted and approved by their engineer before commencement of the work; the Court held that the company was not restricted to building the viaduct in one open space, or arch, but might carry the viaduct, according to the terms of their Act, on piles driven into the river, without doing any permanent damage to the proprietors of the river (1). Where by a Railway Act it was provided that it should be lawful for the company in constructing their railway to carry the same on a level across a road at a particular point, provided the company should erect and maintain a good and sufficient public foot-bridge for the use of foot-passengers over such road at or near the point of level crossing; it was held by the Lords Justices, reversing a decision of the Court below, that such a provision was permissive merely, and not mandatory, and they

Company not compelled (here) to build viaduct over a river in one space or arch.

Proviso for crossing a road on a level permissive (here) and not mandatory.

(1) *Birmingham Waterworks Company v. London and North Western Railw. Co.*, 4 L. T. (N. S.) 398.

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dissolved an injunction which had been granted restraining the company from crossing the road not on a level, but by raising the road and building a bridge over it, and carrying the line of railway underneath; and, *per* Lord Justice Turner, it is most inconvenient for the Court to grant an injunction to restrain the making and constructing a railway "in any other manner than authorized by the words of an Act of Parliament;" unaccompanied by a statement of what, in the opinion of the Court, is the right mode of constructing the railway; as no possible alteration could be made by the company without exposing themselves to an application for an injunction (1). On the construction of the Manchester and Leeds Railway Act, a general power authorizing the construction of bridges and other works, either temporary or permanent, for the purposes of the Act, and according to its provisions and restrictions, was held not to be restrained by preceding Acts which authorized the erection of a certain number of bridges, and forbade the making any other bridges save as were thereinbefore provided for, or in any manner to obstruct the navigation save as thereinbefore mentioned; and the company having power to build a temporary bridge for certain purposes, were held entitled to use it for other purposes, provided they did not thereby occasion greater obstruction to the navigation than they otherwise would have done, or continue to use it after the permanent bridge was finished; and the Court (Alderson, B.) dissolved an injunction against their erection of a temporary bridge; and Baron Alderson said that in considering whether a bridge built under the powers of this Railway Act was built as reasonable and skilful men exercising a proper judgment would build, it must be remembered that these bridges were built in a railway, and it must be considered, with reference to that circumstance, whether it was such as the company, executing their

Where an Act enacted span of each arch of bridge over turnpike-road should be not less than

power fairly and discreetly, were competent to build (2). Where the Act empowering a company to erect bridges across roads enacted that the span of the arch should be formed so as to leave a clear space under each arch of not less than fifteen feet; the

(1) *Dover Harbour (Warden and Assistants) v. London, Chatham, and Dover Railw. Co.*, 7 Jur. (N. S.) 453; 30 L. J. (Ch.) 474.

(2) *Priestley v. Manchester and Leeds Railw. Co.*, 4 Y. & C. 63; 2 Railw. Cas. 134.

Vice-Chancellor held, that the company in carrying a bridge over a turnpike road might erect the piers upon the road, and were not bound to leave more than a clear open space of fifteen feet under each arch, notwithstanding the original width of the road would be considerably lessened thereby; and, upon an application of the trustees of the road, refused an injunction to restrain the company from erecting an arch with a clear space under it of twenty-four feet width where the road was thirty-eight feet wide, and from erecting any other arch which would so obstruct or narrow it as to be a nuisance or injury to the public, but gave leave to the trustees to proceed against the company at Law (1). Where a railway company, in exercise of their powers conferred on them by an Act of Parliament, which gave compensation to persons whose property might sustain damage from their operations, were proceeding to erect an arch above a mill-race for the purpose of sustaining an embankment on which the railway was to be constructed, and it appeared that injury would be done to the mill if the arch were of the proposed dimensions, but that the injury would be avoided if the arch were of certain larger dimensions; Lord Chancellor Lyndhurst, being of opinion that in such a case the Court ought to interfere, granted an injunction to restrain the company from making over the mill-race an arch of less than certain specified dimensions recommended by the report of an engineer appointed to make a report on the subject (2). Where a railway company in the progress of their works proposed to cross a mill-stream by a bridge to be supported in the centre of the mill-stream by two piles placed sixteen feet apart, and the bridge was to be six feet in height above the level of the water, and the plaintiff, the owner of the mill, asserted that that height was insufficient to allow barges to pass under, and also that placing piles in the stream would impede the flow of the water, and thereby stop the working of the mill; and the company adduced affidavits of engineers to shew that the level of the railway, and the nature of the ground upon which the embankments were founded, prevented them from making the bridge of a greater height, and that over a public navigable river which was con-

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fifteen feet, company held entitled to erect piers on road, and not bound to leave more than fifteen feet under each arch.

Company restrained (here) making an arch over a mill-race less than certain dimensions.

Nothing but necessity justifies a company carrying on their works in such manner, or on such level, as to cause serious damage to the owner of the land. The Court will seek an engineer's assistance in forming a decision as to whether a bridge proposed to be carried over a mill-stream, is of a proper height, &c.

(1) *Att.-Gen. v. London and Southampton Railw. Co.*, 9 Sim. 78; 1 Railw. Cas. 283.

(2) *Coats v. Clarence Railw. Co.*, 1 Russ. & M. 181.

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nected with the mill-stream, there were some bridges only six feet high, and moreover that at the time of the passing of their Act there was over this mill-stream a bridge of that height, though such bridge had since been pulled down by the plaintiff and re-erected of a greater height, and that the flow of water would be in no way impeded by the piles; and the plaintiff adduced affidavits of engineers to shew that although some of the bridges over the navigable river were of the height of six feet only, yet that the water under them could be lowered by waste gates; and that to obtain a perfect level on the line of the railway the embankments, and consequently the bridge over the mill-stream, ought to be raised two feet; the Vice-Chancellor held, that the Act authorizing the company to conduct their works doing as little damage as possible, the plaintiff, under the circumstances stated, was not entitled to require the company to build the bridge at the height of more than six feet. But it was held by the Lord Chancellor that nothing but necessity could justify the company in carrying on their works in such a manner, or on such a level, as would cause serious damage to the owner of the land; and in a case where the affidavits on engineering points are conflicting, the Court will seek for the professional assistance of some impartial engineer to form a decision upon them (1). Where, in consequence of a company raising the level of their railway within the limits of vertical deviation, it became necessary to raise the height of a bridge over which a road was to be carried, Lord Chancellor Cottenham dissolved an injunction which had been granted by the Vice-Chancellor of England, and held, that there was no restriction as to the powers of the company to alter the levels of the approaches to the bridge, provided the land to be affected was included in the plans and sections deposited or mentioned in the books of reference, and that full satisfaction was made to all parties interested for the damage sustained (2). Where mentioned in the books of reference, and full satisfaction for damage.

There is no restriction as to the powers of a company to alter levels of approaches to a bridge to be raised, over which a road is to be carried, provided the land is included in the plans and sections, or mentioned

(1) *Manser v. Northern and Eastern Counties Railw. Co.*, 2 Railw. Cas. 380; 5 Jur. 983.

(2) *Beardmer v. London and North Western Railw. Co.*, 1 Mac. & G. 112;

1 H. & T. 161; 5 Railw. Cas. 728; *et v. Feoffees of Heriot's Hospital v. Gibson*, 2 Dow. 301; *North British Railway v. Tod*, 12 Cl. & F. 722.

a local board of health withdrew its opposition to a railway bill upon the insertion in the Act of a clause providing that no bridge carrying a road over the railway within their district should have an approach with a slope of more than 1 in 30; the making a slope of 1 in 30 required an encroachment on the land of a person, who obtained an injunction to prevent such encroachment, and the company thereupon made a bridge with a slope of 1 in 20; Lords Justices Rolt and Cairns held (reversing a decision of Vice-Chancellor Stuart)—upon an information praying that the companies might be restrained from permitting the approaches to the bridge to remain with a clear space between the fences of less than thirty feet, or with the ascent to the bridge exceeding 1 in 30—that the company (one of the amalgamated companies) must not have a bridge with a slope of more than 1 in 30, and that it was no answer to say that this requisition could not be complied with without stopping the railway (1). Where an information was filed at the relation of one of the commissioners appointed under 12 Geo. 3, and 57 Geo. 3, for the purpose of restraining two railway companies from constructing or making any covering or building over certain streets and courts within the jurisdiction of the said Acts, and the defendants were desirous of building a station, and for that purpose proceeded under the powers of their Act to arch over certain streets within the jurisdiction of the said paving commissioners; it was held by the Lord Chancellor, on appeal, that an injunction should issue to restrain the defendants from constructing or making any covering or building over the streets in question further or otherwise than might be necessary for the purpose of constructing the railway, but at the same time he directed a case for the opinion of the barons of the Court of Exchequer as to the right of the company to cover in or build over such street for the purpose of a station; and their Lordships having certified that they were of opinion that the defendants were entitled (if it was necessary or reasonably convenient for the construction of a station and proper warehouses) to construct such coverings or buildings by arches or otherwise over the streets within the jurisdiction of the paving commissioners; the Lord Chancellor held, that the in-

(1) *Att.-Gen. v. Mid Kent Railw. Co. and South Eastern Railw. Co.*, L. R. 3 Ch. 100; 16 W. R. 258.

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The Court granted a mandatory injunction in effect compelling a railway company to pull down walls built to prevent another company crossing the line by means of a bridge the plaintiffs were authorized to build.

junction should be dissolved, the fact of the commencement of the works by the defendants being sufficient proof of the necessity for and the convenience of such buildings (1). In *Great North of England, Clarence, and Hartlepool Junction Railway Company v. Clarence Railway Company* (2) Vice-Chancellor Sir J. L. Knight Bruce granted a mandatory injunction in effect compelling a railway company to pull down walls which they had built in order to prevent another railway company from crossing the line by means of a bridge the plaintiffs were authorized by their Act to build across their line; but with a proviso (3) that the injunction was not to be considered as authorizing the plaintiffs to do any vexatious act, or any act not necessary for erecting and completing the bridge in a reasonable and proper manner, or to prolong the work unnecessarily, or to obstruct, interfere with, or delay the traffic or free passage of the defendants, their workmen or agents, along their line of railway, &c. Where a Railway Act gives power to Company A. to build a bridge across the line of Company B., provided that the width between the abutments of the bridge is not less than twenty-six feet, and at the point where the bridge is to be built the land of the B. Company is forty-seven feet wide; the A. Company have no right, within the meaning of the Act, to build the abutments of their bridge upon the land of the B. Company; but having purchased adjoining land for that purpose, they have a right at law to the temporary use of the land of the B. Company for the purpose of their building; and *quære*, whether this Court, on motion for an injunction to restrain the obstruction of the works, has not jurisdiction to award and secure to them possession of such temporary easement (4). Where a special Railway Act provided that the line should be made according to the levels shewn on the deposited plans, and that "it should be lawful" for the company to carry the line across a specified street on the level of the street; the Lords Justices held—reversing a decision of Vice-Chancellor Sir J. Stuart, upon an application for an inter-

(1) *Att.-Gen. v. Eastern Counties Railw. Co. and Northern and Eastern Counties Railw. Co.*, 2 Railw. Cas. 823.

(2) 1 Coll. 507; 5 Railw. Cas. 605.

(3) See *Lane v. Newdigate*, 10 Ves.

195.

(4) *Great Northern of England, Clarence, and Hartlepool Junction Railw. Co. v. Clarence Railw. Co.*, 1 Coll. 507; 5 Railw. Cas. 605.

locutory injunction—that the latter provision was not obligatory, and did not prevent the company from carrying their line across the street according to the provisions of the general Act (1). In *Raphael v. Thames Valley Railway Company* (2) the Master of the Rolls, Lord Romilly, held, that the Court will not interfere by way of mandatory injunction to compel the specific performance of a contract against a railway company where the works have been already erected, and the public convenience would be sacrificed by interfering so as to compel the removal or the alteration of the works already executed. In this case a railway company agreed with a landowner to make a bridge and other accommodation works, and upon the works being commenced in a manner at variance with the agreement, the landowner filed a bill for the specific performance of the agreement, and for an injunction to restrain the completion of the works in progress; the motion for the injunction was ordered to stand over until the hearing of the cause, upon the company undertaking to deal with the works as the Court should direct; and before the hearing of the cause the works were completed and the line of railway opened for public use; the Master of the Rolls held, that, although the landowner had sustained some damage by the variation from the agreement, the Court, taking into consideration the safety and convenience of the public, and being satisfied that the works had been executed “so as to interfere as little as possible with the plaintiff’s convenience” (an expression which occurred in the agreement) must refuse him any relief except in damages. But, on appeal, the Lord Chancellor, Lord Chelmsford, held, reversing the decision of the Master of the Rolls, that the company could not set up the inconvenience to the public by the interference with the traffic, and that this was no ground for refusing specific performance of the agreement, and a decree was made according to the prayer of the bill.

The Court will interfere by mandatory injunction to compel specific performance of a contract against a railway company, though works (at variance with the agreement) are already erected—and the company cannot set up public inconvenience by interference with the traffic.

15. The 16th section of the 8 Vict. c. 20 (the Railways Clauses Consolidation Act) authorizes the permanent diversion of public roads, and not only a temporary diversion for the purpose of con-
 permanent diversion of public roads, and not merely a temporary one.

Sect. 16 of Railways Clauses Consolidation Act authorizes the

(1) *Dover Harbour (Warden) v. London, Chatham, and Dover Railw. Co.*, 3 De G. F. & J. 559.

(2) L. R. 2 Eq. 37; 12 Jur. (N.S.) 656; 35 L. J. (Ch.) 659; L. R. 2 Ch. 147; 36 L. J. (Ch.) 209.

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If a railway crosses a highway without diverting it, a bridge must be made over or under railway—sect. 40 of Railways Clauses Consolidation Act. But the highway may be diverted under sects. 16, 53, and 56, to a level crossing, if the road will be more convenient than a bridge.

Where time had been made the essence of a contract for making crossings, the Court refused specific performance of the works.

structing a railway; and Vice-Chancellor Sir J. Stuart dismissed a bill filed for an injunction to restrain such a permanent diversion (1). In *Att.-Gen. v. Ely, Haddenham, and Sutton Railway Company* (2), Lord Chancellor Hatherley held, upon an appeal from a decision of the Master of the Rolls, Lord Romilly—which he affirmed, but upon different grounds—that if a railway crosses a highway without diverting it, a bridge must be made for the highway over or under the railway, according to the Railways Clauses Consolidation Act, 1845, s. 40; but that the highway may be diverted, under ss. 16, 53, and 56, to a place where there is a level crossing, if the road so diverted will be more convenient than a bridge. The Master of the Rolls had dismissed an information in this case on the ground that it was not, in his opinion, the province of a Court of Equity to interfere to compel defendants who had done something *ultra vires* but *bonâ fide* with the view of accommodating the public, to do something other than that they had done, which would be *intra vires*, and therefore legal, but would be more inconvenient to the public, or the persons complaining, than that which existed (3). But in such a case the Master of the Rolls dismissed the information without costs, and without prejudice to the Attorney-General proceeding against the company at Law.

16. Where the Court considered that time had originally been made of the essence of a contract for making crossings, and that there was no sufficient evidence of any agreement to enlarge the time, or that it had been waived by the conduct of the agents of the company, the Court, reversing a decision of Vice-Chancellor Sir J. Stuart, refused specific performance of the works (4). In this case, in June, 1858, an agreement was entered into between D. and a railway company, by which the company should make and maintain, for the convenience of D.'s estate, as many crossings, and of such kinds, as his agent C. should within one month after obtaining possession of the land direct and notify in writing to the company; and the company obtained possession of the land in

(1) *Phillips v. London, Brighton, and South Coast Railw. Co.*, 4 Giff. 46; 9 Jur. (N. S.) 348.

(2) L. R. 4 Ch. 194; 38 L. J. (Ch.) 258; 17 W. R. 356; 20 L. T. (N. S.) 1.

(3) *Id.* L. R. 6 Eq. 106; 37 L. J. (Ch.) 822; 16 W. R. 834.

(4) *Darnley (Earl) v. London, Chatham, and Dover Railw. Co.*, 9 Jur. (N. S.) 148; 33 L. J. (Ch.) 9.

December, 1858, but C. did not send in his notification till the 5th of March, 1859.

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17. Where a railway company had served notices to treat for the purchase of land on a landowner, and on the tenant of a farm, but before the company had taken possession of the land the tenancy expired, and another tenant had entered into possession of the farm, and without notice, as alleged, of the construction of the intended railway; and the new tenant and his solicitor having requested the company to serve the former with notice, to enable him to send in a claim for compensation, and the company had refused to do so, and the new tenant then filed a bill for an injunction; Vice-Chancellor Sir J. Stuart, upon a motion, ordered the matter to stand over to the hearing of the cause, the company undertaking to pay £500 into Court, and to serve the plaintiff with notice to treat within four days (1).

A new tenant, entering without notice of an intended railway, a farm, before the company has taken possession, is entitled to notice to treat notwithstanding notice to prior tenant.

18. Where a railway company served an occupier with notice to treat for part of a property described on the plan annexed to a schedule to their notice, which shewed a plot of ground partly within and partly without the limit of deviation, bounded at the extremity by a road; and the deposited plans had marked upon them a field, which the proposed line of railway would not touch, but through which the limit of deviation would pass, and the boundaries of the field outside the limit of deviation were not marked on the plan, but the boundaries which were within that line were marked; Vice-Chancellor Sir J. Stuart granted an injunction to restrain the company from taking the land comprised in their notice, as it was evident that no part of the field constituted one close, and that therefore the company had no power to take the land comprised in their notice (2).

19. Sect 68 of the 8 Vict. c. 18 applies not only where a company must be rightfully in possession, but where compensation is sought by persons having a limited interest; and if a railway company take possession of land under a misapprehension that a tenant for life is owner in fee, the Court will restrain the company from

Company taking possession under supposition that a tenant for life was tenant in fee, restrained

(1) *Carter v. Great Eastern Railw. Co.*, 9 Jur. (N. S.) 618; 8 L. T. (N. S.) 197.

(2) *Wrigley v. Lancashire and Yorkshire Railw. Co.*, 9 Jur. (N. S.) 710; 4 Giff. 352.

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retaining possession, though railway constructed.

retaining possession of the land until compensation has been made to every person having an interest in the lands; so held by Vice-Chancellor Sir J. Stuart, in a case where a company had entered into an agreement with the supposed agent of the tenant in fee, under the 84th section of the 8 Vict. c. 18 (the Lands Clauses Consolidation Act), and had taken possession of the land for about two years, and had constructed their railway thereon, the bill being filed by the remaindermen and mortgagees (1); the Vice-Chancellor said that the case of *Deere v. Guest* (2) had been referred to as an authority to shew that Lord Cottenham decided that this Court would not interfere by injunction to restrain the use of works constructed on land which had been taken possession of, where that possession had been obtained even by fraud. But the Vice-Chancellor said that the marginal epitome of the report of that case was inaccurate; and that there was not one word of Lord Cottenham's judgment to justify so extraordinary a proposition as that this Court would not interfere against a possession fraudulently taken, whether the works were constructed or not. And Lord Chancellor Cranworth, in *Inge v. Birmingham, Wolverhampton, and Stour Valley Railway Company* (3), said that he conceived (though it was a course, he believed, often pursued) it was contrary to the provisions of the Lands Clauses Consolidation Act, 1845, that a company should take possession of the land until it had settled with everybody, and not merely with the tenants. But where a railway company had given notice to a tenant at will to take part of the lands, and the company had been allowed to take possession and complete their line, and afterwards a person who had subsequently to the notice purchased one-ninth of the land filed a bill merely praying an injunction to restrain the railway company from entering upon, continuing in possession of, or otherwise interfering with the land; the Master of the Rolls, Sir J. Romilly, dismissed the bill with costs, but the plaintiff to be allowed the costs of the defendants contesting his title. The Master of the Rolls said that the company had given the proper notice to a person in possession, apparently as owner, and where the plaintiff

Where notice to a tenant at will in possession, apparently owner, purchaser of part of land subsequent to notice cannot restrain company from keeping possession.

(1) *Perks v. Wycombe Railw. Co.*,
3 Giff. 662; 8 Jur. (N. S.) 1051.

(2) 1 My. & Cr. 516; *v. post*, p. 828.

(3) 3 De G. M. & G. 658.

had no interest in the property, and that the plaintiff was but the purchaser of an interest in the purchase money, and not entitled to an injunction; that he had a right to be paid for the land, but not in a Court of Equity (1). The Court will not construe the compulsory powers of a railway company so as to extend them beyond the express words or the absolutely necessary implication of the Act; it being the duty of the company to take care that the public understand, before the Act is passed, the extent of the compulsory powers which they require (2). And where, by an Act passed in 1864, a railway company were authorized to execute certain works, and certain land belonging to L. was included within the powers of that Act; and by an Act passed in 1865 the company were authorized to construct additional works, but no land belonging to L. was included in the powers of that Act; Lords Justices Selwyn and Giffard held, affirming the decision of Vice-Chancellor James, that the company had no power to take compulsorily the land of L. for the purposes authorized by the Act of 1865 (3). When a railway company has given notice to take land for some object which is clearly within their compulsory powers, a Court of Equity will not interfere to restrain them merely on the ground that they might obtain the same object in some other way without taking the land (4). In this case the company desired to take L.'s land in order to make a new road thereon in place of a road which they were authorized to stop up. They could have made the new road on other land which they had acquired, but for the fact that they were going to build a public-house on that other land. The Court held that this circumstance did not entitle L. to an injunction to restrain the company from taking his land for the purpose of making the road over it. Where a railway company, after the compulsory powers of their original Act expired, and the railway was opened for traffic, obtained another Act enabling them to widen their line and enlarge their stations, and to take additional pieces of land; it was held that, under these circumstances, the company could not proceed to take a piece of land subject to the compulsory powers of both Acts under a notice to treat given under their original

The Court will not construe compulsory power of a railway company beyond the express words or necessary implication of Act.

(1) *Carnochan v. Norwich and Spalding Railw. Co.*, 26 Beav. 169. Co., L. R. 4 Ch. 522; 21 L. T. (N. S.) 98; 17 W. R. 746.

(2) *Lamb v. North London Railw.*

(3) *Ib.*

(4) *Ib.*

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Compulsory powers to take land must be exercised for the sole purpose of constructing the railway and works.

And the Court restrained constructing a road, on the ground that it was intended for accommodation of an adjoining landowner.

Act (1). A railway company can only take advantage of the powers of entering on land given by the Lands Clauses Act, 1845, s. 85, where the necessity for immediate entry is so urgent as to preclude them from following the slower modes of procedure which that Act provides (2). The valuation which, by s. 85, a railway company is required to obtain before exercising the power of entry given by that section, must include compensation for severance, &c. (3). A railway company exercising that power since the 20th of August, 1867—the date of the passing of the Railway Companies Act, 1867—is not entitled to proceed upon a valuation made prior to that date, but must comply with the provisions of s. 36 (4). Compulsory powers to take land are given to railway companies, and must be exercised, for the sole purpose of constructing the railway and works; therefore, where a railway company endeavoured by means of their compulsory powers to construct a road so as to accomplish a subsidiary object, they were restrained at the instance of the landowner whose property would be affected, though the proposed works were within the scope of their Act (5). In this case a railway company was authorized by their Act of Parliament to make deviations in their line of railway; and within the limits of deviation a house of the plaintiff stood near a road which, according to the terms of the Act, the company was authorized to make, and raise at a certain rate of inclination, and carry over their line of railway; and the railway company afterwards proposed to alter the course of the road, according to a plan which would make it necessary to pull down the house; and a notice was served on the plaintiff, and an offer to accept a certain sum for the house was made by him, which was not accepted; and the company being about to take possession, under the 85th sect. of the 8 Vict. c. 18, the plaintiff moved for an injunction, on the ground that the proposed new road was intended for the accommodation of an adjoining landowner and proprietor, who was to pay part of the

(1) *Richmond v. North London Railw. Co.*, L. R. 5 Eq. 352; 37 L. J. (Ch.) 273; 16 W. R. 449; 18 L. T. (N.S.) 8; L. R. 3 Ch. 679; 37 L. J. (Ch.) 886.

L. R. 5 Eq. 190; 18 L. T. (N.S.) 534; 16 W. R. 273.

(3) *Ib.*

(4) *Ib.*

(2) *Field v. Carnarvon and Llanberis Railw. Co.*, 37 L. J. (Ch.) 176;

(5) *Dodd v. Salisbury and Yeovil Railw. Co.*, 1 Giff. 158; 5 Jur. (N.S.) 782; 33 L. T. 311.

expenses of the alteration, and on that ground Vice-Chancellor Sir J. Stuart granted the injunction. But where a railway company having purchased and taken an assignment of the interest of a leaseholder in premises, also took under their compulsory powers the interest of the freeholder in the same premises, and paid the amount of the valuation of such interest, and compensation for injuriously affecting the other adjacent property of the freeholder, into Court, and the freeholder afterwards, objecting to the formation of a coal depôt on the premises which had been so taken, not having executed any conveyance of the property to the company, brought an action against the company, treating the company as assignees of the lease, for damages upon the covenants therein; the Court restrained the action, but without prejudice to any proceedings against the company in which their title, as owners of the land, should be admitted (1). And where the E. C. and L. B. Railway Companies were duly empowered to make a railway and to take certain lands for that purpose; and after giving the usual notice, as required by the provisions of the Lands Clauses Consolidation Act, to the lessee in possession of the lands, the companies, with his permission, entered into possession and commenced the necessary works; and the lessee made no statement of his interest, and no information was given to the companies of the interests of the plaintiffs; and afterwards the companies paid valuable consideration to, and obtained a conveyance from, parties who claimed to be owners of the property, and to be capable of conveying it; and other parties, who claimed to be part owners, who had not been served with notices, and who were ignorant of the above proceedings, then came forward, and, together with the lessee, denied the right of the former parties to grant a conveyance; on motion for an injunction by the new claimants, Vice-Chancellor Sir J. Stuart would not interfere with the possession by the companies, but required the companies to undertake to proceed forthwith to determine the value of the land, to undertake to pay the value when determined, and to give the new claimants the usual bond under s. 85 of the Lands Clauses

The Court refused to disturb the possession of a company after notice to lessee and conveyance from parties claiming as owners, &c.

but directed an inquiry as to title of new claimants, &c.

(1) *East and West India Docks and Birmingham Junction Railw. Co. v. Dawes*, 11 Hare, 363.

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Company having paid part of purchase money, may take possession and retain balance until vendor makes a good title.

A company that has taken land without authority, but has had undisturbed possession with acquiescence of owner for several years (here fifteen), will not be dispossessed.

By proceeding under the compulsory powers of the Lands Clauses Consolidation Act, a company waives its remedy for specific performance of an agreement entered into prior to their Act.

Consolidation Act; and thereupon directed an inquiry whether the new claimant could make a title without prejudice. But the order did not give liberty to adverse claimants to come in and prove their claims, as they could apply by summons at chambers (1).

But where a railway company has paid part of the purchase money of land required by them, it may take possession, and retain the balance until the vendor makes a good title; for the company, by this part payment, purchases the right of possession, and will not be restrained from retaining possession, nor ordered to pay the balance into Court (2). Where an Act authorized the construction of a railway over the land of another, upon making compensation, and the railway was made without authority from the owner of the land, but was afterwards used for fifteen years with his knowledge, the owner was not permitted to interfere with the possession.

All he is entitled to is to have the compensation assessed and paid.

After an acquiescence on the one hand, and an undisturbed enjoyment on the other, for several years, the possession will not be disturbed, but a proper compensation will be assessed and paid (3).

And if a company, the promoters of which have entered into an agreement to purchase, proceed subsequently to their Act, under the compulsory powers of the Lands Clauses Consolidation Act, by giving notice to treat and entering into possession of the land under sect. 85 of the Act; by resorting to these remedies, although the agreement might have been binding upon the defendant, the company waives its remedy for a specific performance of the agreement. In this case the promoters of an intended railway had entered, by their agent, into an agreement with a landowner that they would buy, and he that he would sell, such of his land as might be required by the promoters of the contemplated railway if the Act were obtained in the following or next following session of Parliament, for a stipulated price of thirty years' purchase of its annual value; and the Act was passed in the second session, after failure in the first, with a deviation from the former course of the line through the defendant's land, and the company then took possession and filed a bill for specific performance of the agreement and to restrain the

(1) *Alston v. Eastern Counties Railw. Co.*, 1 Jur. (N.S.) 1009.

Railw. Co., 9 Jur. (N. S.) 365; 11 W. R. 657.

(2) *Capps v. Norwich and Spalding*

(3) *Mold v. Wheatecroft*, 27 Beav. 510.

defendant from taking any proceedings under the Lands Clauses Act for assessing the value except on the footing of the agreement; Vice-Chancellor Sir W. P. Wood dismissed the bill, but without costs, as he said the defence might have been raised by demurrer (1).

Where, under an agreement containing mutual grants, the plaintiffs (a railway company) had been put in possession by the defendants (another railway company) of what was granted to them, and enjoyed it for several years, while the defendants took no steps to require the performance of the stipulation for their benefit, but allowed the time to expire within which it should have been performed, the Court granted an injunction to restrain the defendants from disturbing the plaintiff's enjoyment (2). Where a railway company, after service of notice to treat for the purchase of land upon an incumbrancer thereon, effected the purchase of the land from an owner entitled by title paramount to that of the incumbrancer served, and entered into possession of such land, it was held (no fraud or collusion being proved or alleged against the company or the vendor), the remedy of the incumbrancer in respect of his incumbrance against the land in the hands of the company, or against the company, was gone (3). Where a railway company, under the powers of the Lands Clauses Consolidation Act, 1845, had given the usual notice of a reference to a jury to assess the value of a portion of a house, shop, and outbuildings which had been occupied together, coffee being roasted in the outbuildings and sold in the shop, and they had given a bond to the lessee, her heirs, executors, administrators, and assigns, and paid into Court £600, the amount at which the value of the buildings taken by them had been estimated under the provisions of the Act; and they then proceeded to enter into possession and to pull down the buildings; and the lessee filed her bill, to which neither the superior landlord nor her sub-lessee was a party, for an injunction to restrain the company from continuing in possession of the buildings, on two grounds: first, that the buildings taken were part of a manufactory, and could not be taken without the rest; and, secondly,

A railway company that has put another railway company in possession, which has remained so several years undisturbed, will be restrained disturbing the possession, though the stipulation (the consideration) has not been performed.

Where a company purchases of an owner entitled by title paramount to an incumbrancer (though after notice to treat served on incumbrancer) the remedy of the incumbrancer as against the land or company is gone.

(1) *Bedford and Cambridge Railw. Lancashire and Yorkshire Railw. Co., Co. v. Stanley*, 11 W.R. 139; 7 L.T. 1 Sm. & Giff. 181.
(N.S.) 477.

(3) *Hill v. Great Northern Railw.*

(2) *Great Northern Railw. Co. v. Co.*, 18 Jur. 685; 23 L.J. (Ch.) 524

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that the bond given was invalid by reason of its being conditioned for payment of the sum specified to the heirs, executors, administrators, and assigns of the lessee; on a motion for the injunction, Vice-Chancellor Sir J. L. Knight Bruce considered that there was a serious question to be tried at Law, whether the whole proceedings of the company had not been illegal; yet, as the only complaining party was not in the occupation of the premises, and had not been and would not be personally inconvenienced by what was done, and as the company, in any event, was entitled to have, and must have, the property sought to be protected by the motion, the dispute being whether they were also bound to take additional property, it forbore to grant an injunction upon the company paying into Court a further sum of £600, and undertaking to abide by such order as the Court might make as to proceeding before a jury under the notice they had given, and as to the possession of the buildings (1). Where a railway company, under the powers of their Act, gave notice to the lessees of a factory and buildings that they required a part of their premises, and the lessees thereupon gave a counter notice, requiring the company, under the 92nd section of the Lands Clauses Consolidation Act, to take the whole, and the company took no further proceedings until the lease of the premises had expired, and the lessees having remained in possession of the premises, the railway company, without serving any new notice on the defendants, had the value of their interest in the whole of the premises assessed, and deposited the amount in Court, delivered a bond, and entered into possession of a part of the premises under the 85th section; and the defendants, conceiving that the company had no right to proceed under the 85th section, sent in a claim, and gave them notice to issue their warrant to the sheriff to summon a jury to assess compensation under the 68th section; and the company thereupon filed their bill to restrain such proceedings, and negotiations had been entered into by the reversioners with the company and with the defendants which rendered it doubtful to what interest in the premises the latter were entitled; on motion to dissolve an injunction granted *ex parte*, the Lord Chancellor held, affirming the decision of the Vice-Chancellor of

(1) *Dakin v. London and North Western Railw. Co.*, 3 De G. & Sm. 414.

England, that the injunction to restrain proceedings by the defendants under the 68th section should be continued until the rights of the several parties had been ascertained (1). Where a landlord entered into some arrangement with his tenant for a lease for eight years, and afterwards a railway company, being in want of part of the farm, agreed with the landlord for its purchase; and subsequently to this, by some mistake, the landlord, on the same day, granted a lease of the whole farm to the tenant, and conveyed part of it to the company; and a question also arose, under the agreement, whether the landlord or the company was to make compensation to the tenant; and the company took possession, and the tenant brought ejectment; the Court held, under these circumstances, that the company could maintain a suit to stay the ejectment and to ascertain the rights, and directed an inquiry (2). Where, on an application for an injunction to restrain a railway company from taking proceedings to summon a jury under the compulsory clauses of the Lands Clauses Consolidation Act, 1845, on the ground that the company had bound themselves to abide by an award respecting the value of the lands; Vice-Chancellor Sir J. L. Knight Bruce thought that the plaintiff would have been entitled to an injunction but for the circumstance that the time limited for the exercise of the compulsory powers was on the point of expiring; but that the doubt as to the validity of such proceedings after that period, although the usual notice had been given of the intention of the company to take the land, was sufficient ground for declining to grant the injunction; on the company undertaking not to act on the result of the jury process without the leave of the Court, and bringing into Court £200 to answer the plaintiff's costs and charges by reason of the process, without prejudice to any question (3). The owner of land upon which a railway company empowered by Parliament are about to enter under their parliamentary powers, is not entitled to an interlocutory injunction to restrain them from so entering

Owner of land who by his silence, &c., has permitted company to enter land, &c., upon sup-

(1) *South-Western Railw. Co. v. Norfolk Railw. Co. v. Bayes*, 13 Jur. Coward, 5 Railw. Cas. 703; 1 H. & T. 435.

377, n. (3) *Wood v. North Staffordshire*

(2) *Norwich Railw. Co. v. Woodhouse*, 11 Beav. 382; S. C. *sub nom.* *Railw. Co.*, 3 De G. & Sm. 368.

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position they
had a right to
do so, not
entitled to
interlocutory
injunction to
restrain enter-
ing, &c.

The Court will
restrain a rail-
way company
taking pro-
ceedings for
taking posses-
sion of land in
the hands of a
receiver.

and taking proceedings in respect of his land under the powers of their Act, if, by his silence and conduct, he has permitted the company to carry on their works upon the supposition that they were entitled to enter on and take the land in question (1). In *Deere v. Guest* (2) Lord Chancellor Cottenham held, on demurrer, that there was no equity to restrain by injunction the owners of a railroad (in this case a tram-road belonging to a private company) made over the plaintiff's land from using the railroad after it had been completed, or from interrupting the plaintiffs' workmen in removing it, and restoring the land to its original state; where the possession of the land for the purpose of constructing the railroad had been obtained from a tenant in possession; the Lord Chancellor said that the case originally might have been a case of waste, occasioned by the cutting of the tram-road and the laying of the iron rails over the plaintiffs' land, but what was then claimed by the defendants was simply a right of way, and if they were not entitled to that right they were mere trespassers, and the plaintiffs had their proper remedy against them as such. Although the Court will restrain one tenant in common from the wilful destruction of the common property held by tenants in common, and enjoyed in conformity with the common rights of the tenants in common; yet, where a railroad company had obtained a lease from five out of six tenants in common, and had, contrary to the wishes of the remaining tenant in common, constructed a railroad on the property, which at Law had been held to be an ouster, the Master of the Rolls, Lord Langdale, refused to interfere by injunction to prevent the dissenting tenant in common from damaging the buildings and railway, though the rent agreed to be paid by the company was three times the former rent (3). Where a railway company, without the leave of the Court, took proceedings under the Lands Clauses Consolidation Act to take possession of lands in the possession of the receiver under the Court; the Master of the Rolls, Lord Langdale, on an *ex parte* motion, restrained the company from taking any proceedings toward taking possession of

(1) *Greenhalgh v. Manchester and Birmingham Railw. Co.*, 3 Myl. & C. 784; 9 Sim. 614.

(2) 1 Myl. & C. 516 (see the observations of Vice-Chancellor Sir J. Stuart, *ante*, p. 820, on the marginal note of this case.)

(3) *Durham and Sunderland Railw. Co. v. Wauw*, 3 Beav. 119.

the land under the above-mentioned Act until further order (1). It is generally incumbent on a company seeking to avail themselves of the provisions of the 85th section of the Lands Clauses Consolidation Act, 1845, to shew satisfactorily and clearly that they have fulfilled its conditions and complied with its requisitions, and if there is room for doubt the landed proprietor should have the benefit of the doubt (2); and the Vice-Chancellor, Sir J. L. Knight Bruce, thinking that the company had not complied with the requisitions of the Act as to the form of the bond, not being with two sureties, which are required as well as when the bond is given by a corporation as by an individual (but the several bond of the company and joint bond of the justices is sufficient), and being for less quantity of land than the lands comprised in their original notice, granted an injunction restraining the defendants from entering upon any of the lands until further order, with liberty to move to dissolve the injunction after having complied with the requisitions of the Act; and this decision was affirmed by the Lord Chancellor, Lord Cottenham. And in this case where certain landowners, by their original bill, sought to restrain a railway company from entering on and taking eight out of ten pieces of land which they had originally given notice of their intention to take, and having obtained an injunction on this bill they then filed a supplemental bill, alleging that the ten pieces formed part of a "manufactory" within sect. 92 of the Lands Clauses Consolidation Act 1845, and praying for an injunction restraining the company from taking possession or assessing the value of the ten pieces before a jury, without taking the whole "manufactory;" the Court granted an injunction to that effect, putting the landowners upon terms to concur, upon the request of the company, in specially taking the opinion of a Court of Law whether the pieces of which notice to take was given were part of a "manufactory" within the meaning of sect 92; but the Lord Chancellor, Lord Cottenham, on appeal, held that the landowners were not entitled to the last mentioned injunction under the circumstances of delay in praying for that particular relief, and

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It is generally incumbent on a company availing themselves of sect. 85 of Land Clauses Consolidation Act, to shew that they have complied with requisitions, &c., of the Act. Company restrained entering land, form of bond being defective.

(1) *Tink v. Rundle*, 10 Beav. 318. *Railw. Co.*, 2 De G. & Sm. 55; 5 Railw. Cas. 412; 12 Jur. 324, 575, 589.
(2) *Barker v. North Staffordshire*

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When power of completing railway depends on consent of landowners, such consent ought to be obtained before proceeding.

A company treating with mortgagor alone, with notice of mortgage, will be restrained proceeding with works until the value of mortgagee's interest is ascertained and paid, or secured.

that the parties asking for an injunction were bound to bring forward their whole case at first. When the power of fully completing a railway, according to the intention of the Legislature, depends on the voluntary consent of individuals having property on the proposed line, such consent ought to be obtained by the company before they proceed in the undertaking (1). Where a railway company having purchased of the proprietors of a canal all their estate and interest in it, subject to certain leases as to portions thereof, being houses and wharves, determinable upon six months' notice, and, previously to obtaining their Act, having agreed with the lessees of the said houses and wharves to give them satisfaction, recompense, and compensation for the value of their leasehold interests, or for damage sustained by them in respect of fixtures and improvements, or otherwise by the execution of the Act; and the railway company, being then the reversioners, gave the lessees notice to determine their tenancies, the Court held, that it would not permit them so to exercise their legal rights on the face of the above agreement (2). Where some property was mortgaged to the plaintiffs, who were not to receive their money until a future day, and a railway company, with knowledge, treated with the mortgagor alone, and, not agreeing, paid into Court, to the credit of the mortgagor, the amount of compensation, but made no provision for the compensation to the mortgagees, under the 8 Vict. c. 18, s. 114, and the company then took possession and commenced pulling down the building, the Master of the Rolls, Lord Langdale, restrained the company from proceeding with the works upon the mortgaged premises until the value of the mortgagees' interests had been ascertained, and paid or secured in the manner required by the Act (3). Where a railway company had power to take land for their line, such power to expire within three years, and the company gave a notice, and executed a bond under the Lands Clauses Consolidation Act, and paid the purchase money into the bank, but did not within the three years take possession, and the company then obtained an extended

(1) *Gray v. Liverpool and Bury* 200; 3 Jur. 258.

Railw. Co., 9 Beav. 391; 4 Railw. Cas. 235.

(2) *Doo v. Croydon Railw. Co.*, 1 Railw. Cas. 257; 8 L. J. (N.S.) Ch.

(3) *Ranken v. East and West India Docks and Birmingham Junction Railw. Co.*, 12 Beav. 298.

Act, but containing similar powers as in the former Act, and gave a new notice to take land of a larger extent, but including the former land, and no money was deposited under the new notice, nor was a new bond executed, and then the company entered upon the land and the landowner filed a bill, and moved for an injunction to prevent the company from proceeding with their line over the plaintiff's land, the motion was refused, the plaintiff having liberty to bring an action (1). Where A. was lessee for years of a house and of a warehouse, between which was a yard, over which she had a right of way granted by the same demise, and B. was the occupier as the under-lessee, and a railway company proposed to take the warehouse, and gave notice, and paid a sum into Court, and gave a bond conditioned to pay compensation money to A., the lessee, "her heirs, executors, or administrators," and then took possession of the warehouse, which they began to pull down; and A., the lessee, filed her bill against the company and moved for an injunction to restrain the company from continuing in possession, and from proceeding to pull down the warehouse, contending that, under the Lands Clauses Consolidation Act, the defendants were bound to take the whole of the premises, and B. the under-lessee was no party to the suit; the Court refused to interfere by injunction, and directed a case for the opinion of a Court of Law (2). Where a railway company, assuming to act under the 85th section of the Lands Clauses Consolidation Act, took possession of some lands belonging to A., whereupon A. filed an injunction bill against the company, and moved accordingly, and, by an arrangement made at the hearing, the company undertook to bring the question of the value before a jury as soon as possible, and the value was accordingly ascertained, and the amount paid to A; a motion by A. that the taxing master might tax the costs of the suit, and that the company might pay them, and that all further proceedings in the suit might be stayed, was refused, but the costs of it were reserved (3). Notice given to a landowner by a railway company of their intention to summon a jury, does not render it

Notice to
landowner of

(1) *Williams v. South Wales Railw. Co.*, 13 Jur. 443.

(2) *Dakin v. London and North Western Railw. Co.*, 13 Jur. 579; *v. ante*, p. 825.

(3) *Langham v. Great Northern Railw. Co.*, 5 Railw. Cas. 263; 17 L. J. (N. S.) Ch. 436; 12 Jur. 574; and see S. C. 16 L. J. (N. S.) Ch. 436; 11 Jur. 839.

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intention to
summon jury,
does not
render it
inequitable
for company to
proceed to
obtain posses-
sion.

A bond to
landowners,
tenants in
common,
jointly, is not
sufficient com-
pliance with
the Lands
Clauses Con-
solidation Act,
s. 85.

A railway
company that
had served

inequitable for them to proceed in the meantime, under the 8 Vict. c. 18, s. 85, to obtain possession, nor is it a sufficient ground to restrain the company from changing the aspect of the property, that the jury may thereby be prevented from accurately awarding compensation with reference to its original state (1). A nomination by the justices, under 8 Vict. c. 18, s. 85, of the surveyor employed by the company, and who has already in the course of such employment valued the land, does not necessarily invalidate a bond under the section. The approval of sureties in a bond under the same section may be given by the justices on an *ex parte* application of the company; but if such a bond be made to landowners jointly, they being tenants in common of the land, it is not a sufficient compliance with the Act; and, *semble*, that the condition of the bond must be for payment absolutely, and not on demand (2). Where the condition of a bond given by a railway company under the 85th section of 8 Vict. c. 18, on taking possession of land before the purchase money was ascertained, was "on demand to pay to the owner, or on demand to deposit in the bank, the amount of such purchase money when determined," it was held, that the condition was bad, as giving the party claiming to be owner the option of compelling payment, either to himself or into the bank, whatever the title might turn out; and at the suit of the obligee an injunction was granted till a proper bond should be executed, although the Lord Chancellor (Lord Cottenham) said that as the bond stood—it giving the plaintiff the option of either receiving the money, or having it paid into Court, he was rather a gainer than loser by the departure from the strict form prescribed by the Act—yet that the object of the Act was to protect the interests of parties under disability by having the money paid into the bank, where any such parties were concerned, and that he could not admit the plaintiff was owner in fee before the title was investigated; and he thought, therefore, the condition ought to be, to pay either to the plaintiff or into the bank, as the case might require, according to the provisions of the Act (3). Where a railway company, having served notice to treat with the owner of

(1) *Langham v. Great Northern Railw. Co.*, 1 De G. & Sm. 486; 5 Railw. Cas. 269.

(2) 1b.

(3) *Poynder v. Great Northern Railw. Co.*, 2 Ph. 330; 5 Railw. Cas. 201; 16 Sim. 3; 5 Railw. Cas. 196.

land under 8 Vict. c. 18, had been furnished with the title and a claim of £500 compensation, obtained possession from the occupying tenant, and commenced the works without paying the money, or lodging it in Court, and giving the security required by the Act, the Court granted an injunction against the company's proceeding with the works, and to compel them to restore the land to its former condition—the injunction not to issue on the company's undertaking to lodge the sum claimed, and give the bond required (1). Where, by an Act of Parliament authorizing an extension of a line of railway, and the construction of a station, which Act incorporated the Lands Clauses Consolidation Act and the Railways Clauses Consolidation Act, it was enacted that, subject to the powers of deviation in the said Railways Clauses Consolidation Act contained, it should be lawful for the said company to make and maintain the said extension, and the said station, and the works connected therewith, in the lines, &c., and upon the lands delineated upon the said plans, &c., and to enter upon, take, and use such of the said lands as should be necessary for the purpose; and the plaintiff's lands were delineated upon the said plans, &c., and marked 1 and 4, and the line of deviation passed through both lots, and the company required the entire lots of 1 and 4 for the purpose of the extension and station; Lord Chancellor held (dissolving an injunction obtained by the plaintiff), that the company were empowered to take all or any part of the lands delineated on the plans, although beyond the line of deviation, and although they were not so entitled under the powers of deviation contained in the Railways Clauses Consolidation Act (2). Where the time allowed to a railway company for the exercise of their power to take lands was three years from the passing of their Act, and during that time they gave the plaintiff notice of their intention to take his lands, and summoned a jury to assess the value of them; but the three years expired before the jury gave their verdict; and on that account the Vice-Chancellor held, that the company were not entitled to take steps for obtaining possession of the plaintiff's lands; the Lord Chancellor, not agreeing with His Honour, directed the opinion of a Court of Law to be

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notice to treat on owner, having obtained possession from occupying tenant, was restrained proceeding with works, and compelled to restore land to former condition, unless company undertook to lodge sum claimed, &c.

(1) *Armstrong v. Waterford and Limerick Railw. Co.*, 10 Ir. Eq. Reps. 60.

(2) *Crawford v. Chester and Holyhead Railw. Co.*, 11 Jur. 917.

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taken on the point (1). Where the defendants, a railway company, were by their Act restrained from interfering with the plaintiffs and other railway companies previously established, except as to the compulsory purchase of lands within certain limits, and the plaintiffs had power by their Act to take some lands compulsorily and others by consent, and the defendants had power to take certain lands, part of which had been purchased by the plaintiffs' consent subsequently to the defendants' Act; the Court held, that the plaintiffs, having occupied the ground before the defendants, were entitled to hold so much of it as was not actually wanted for the formation of the defendants' railway, and granted an injunction accordingly (2). Where a railway company entered on land, to survey, and take levels, &c., and drew a trig line across it without the consent of and without notice to the owner, whereupon he filed his bill, and applied for an injunction; and the company alleged that they only entered to make a survey, but would not do more without serving the notices; the Court refused an injunction, but reserved the costs (3). Where, before the amount to be paid by a railway company for land required by them for the purposes of their railway had been determined, a verbal consent—by one party stated to be qualified, by the other alleged to be general—was given, whereupon the company entered upon the land and commenced works which permanently affected it; the Court held, that it would not interfere by injunction to stop the works if perfect justice could be done by compelling the company to pay for the land, but ordered the proximate value to be deposited until the amount could be determined (4). Where the plaintiff agreed to sell to a railway company a certain portion of a field for the price of £229 in the whole—being £120 for the land, and £109 for compensation for damage by severance to the remaining portion—and stipulated that, in case additional land should be wanted, the same should be taken and paid for after the same rate per acre,

Court refused an injunction against a company that had entered merely to survey, and alleging they would do no more without serving notices.

Court refused an injunction to stop works where company had entered under a verbal consent, but ordered proximate value to be deposited.

(1) *Brocklebank v. Whitehaven Junction Railw. Co.*, 15 Sim. 632; 5 Railw. Cas. 373; 16 L. J. (N.S.) 471; 11 Jur. 663.

(2) *Lancaster and Carlisle Railw. Co. v. Maryport and Carlisle Railw. Co.*, 4 Railw. Cas. 504.

(3) *Fooks v. Wilts, Somerset, and Weymouth Railw. Co.*, 5 Hare, 199; 4 Railw. Cas. 210.

(4) *Langford v. Brighton, Lewes, and Hastings Railw. Co.*, 4 Railw. Cas. 69; see also *Cromford Canal Co. v. Cutts*, 4 Railw. Cas. 442.

and the company subsequently took possession of a second portion of the field for purposes authorized by their Act, and entered upon the same without having previously paid the purchase money for that second portion after the rate specified in the agreement, and without having previously agreed upon, or ascertained by reference to a jury, the damage occasioned by the severance of the second portion from the remaining portion of the field; it was held by the Lord Chancellor, that the agreement only provided for the amount to be paid to the plaintiffs for the value of the second portion of the field, and that neither by intention nor legal construction did such value include the amount of damage by severance to the remaining portion of the field, which amount was either to be agreed upon by the parties or ascertained by a jury; and that until such amount was agreed upon or ascertained the company were not entitled to enter upon the second portion (1); but upon an agreement by the company to pay the amount of damage done to land by severance, and to take proper proceedings, if necessary, for ascertaining such amount, the injunction restraining them from entering adjoining land until the amount of such damage was ascertained was withheld (2). Where a railway company gave a notice to treat for the purchase of property, and afterwards obtained an injunction *ex parte* to restrain the owner from selling by auction, Vice-Chancellor Sir J. Stuart refused a motion to dissolve, on the ground that after such notice neither party could get rid of the obligation to buy and sell (3). Where a railway company, having taken land belonging to V., and completed the railway, after negotiating gave a notice to V. to treat for other land, for the purpose of enabling them to carry out an agreement with L.; Vice-Chancellor Sir R. T. Kindersley, upon a bill by V. charging that the land was not required for the purposes of the railway, and asking a declaration that the notice was void, and an injunction to restrain the defendants from taking the land, granted, at the hearing, an injunction. The Vice-Chancellor said: "It comes to this—if the company are entitled to take this land, they would be equally entitled to take land belonging to any one which happened to be

After notice to treat, neither party can get rid of the obligation to buy and sell.

The Court will restrain a company taking land not required for the purposes of the railway.

(1) *Jones v. Great Western Railw. Co.*, 1 Railw. Cas. 684.

(2) *Ib.*

(3) *Metropolitan Railw. Co. v. Woodhouse*, 11 Jur. (N.S.) 296; 34 L. J. (Ch.) 297.

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within the limits of deviation, not for the purpose of constructing the railway, but to enable them to satisfy the requisitions of a third person" (1). Where a railway company was empowered to take lands, and to deviate to the extent of 100 yards from the line laid down in their map, provided such deviation was made before the 4th of July, 1838; and in January, 1837, a deviation in the line within the prescribed limits was made; and a subsequent Act, passed in May, 1837, enacted that the time by the first Act limited for the compulsory purchase of lands should be enlarged for the term of one year; but providing that no deviation from the line laid down should be made after the expiration of the period by the first Act limited; and the railway company, subsequently to the 4th of July, 1838, gave notice to certain owners of lands on the line to which they had deviated in January, 1837, of their intention to take the lands under the powers given by the Acts; on a motion for an injunction to restrain the railway company from so proceeding to obtain possession, on the ground that the company, having allowed the time limited by the first Act to expire, had no power to take the lands by the compulsory process; the Court held, that the company, having previously to the expiration of the time limited by the first Act, and previously also to the passing of the second Act, deviated within the authorized limits from the line laid down in the map, the second Act must be construed to give them an enlarged period of one year in which to exercise the power of taking the land in the line to which they had so deviated (2). Where A., on whose fields a railway company had entered without notice or permission, filed a bill and applied for an injunction to restrain them from digging away a part of one field and depositing it on a certain other field; but it appearing that there had been a disposition to treat on the part of A., and that the steps taken were necessary for the public safety; on the company undertaking to pay into Court the probable value of the land taken, the injunction was refused (3). A subsequent treating safety; company undertaking to pay probable value into Court.

Court refused to restrain digging, &c., by a company that had entered lands without permission, a disposition to treat having been shewn by landowner, and the steps being necessary for public

(1) *Vane v. Cockermouth, Keswick, North Midland Railw. Co.*, 1 Railw. Cas. 135.
(2) *River Dun Navigation Co. v. Penrith Railw. Co.*, 13 W. R. 1015.

(3) *Tower v. Eastern Counties Railw. Co.*, 3 Railw. Cas. 374.

with a railway company will be considered by the Court as a waiver of objections to proceedings the subject of the treaty, although such proceedings be not, in fact, authorized by the Railway Act; and the Court held, that eight days' notice of intention to file a bill, where there has been previous treating, was not sufficient to entitle a plaintiff to his costs (1). Where a railway company, under the powers of their Act, purchased a subsisting lease in lands, and gave a notice to the plaintiff, the owner of the reversion in fee, for summoning a jury to assess the value of the fee simple and inheritance thereof; and the plaintiff filed his bill, insisting that the company were not authorized by their Act to take more than a certain portion of the land, and praying an injunction to restrain them from proceeding to assess the value of the excess beyond that portion; it was held by the Court, that inasmuch as the contemplated proceedings would, if the company were not authorized by their Act to take the land in question, be a nullity; and inasmuch as the entry and possession of the plaintiffs, or derivative lessees, was lawful, and no case being made of any sudden grievous injury done to the inheritance, the motion must be refused with costs (2). Where the Birkenhead and Chester Railway Company agreed with the plaintiff to give him, for fourteen acres of land, £20,000, to be paid by instalments; and the Birkenhead and Chester Company and a rival company, called the Chester and Birkenhead Railway Company, both went to Parliament, and in committee it was agreed that it should be referred to two members of the committee to choose between the two lines, and that the selected company should take the engagements with the landholders entered into by the others, and this agreement was signed by the agent of the plaintiff; and the Chester and Birkenhead Company were selected, and obtained their Act, and for their proposed line sixteen acres of the plaintiff's land in another part of the estate would be required; and the plaintiff filed his bill against the Chester and Birkenhead Railway Company, alleging the above facts, and praying that the contract of adoption might be declared binding on the defendants, and that they might be decreed to perform the same, and be restrained from entering on his

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A subsequent treating with company will be considered as a waiver of objections to proceedings, the subject of the treaty.

(1) *Tower v. Eastern Counties Railw. Co.*, 3 Railw. Cas. 374.

(2) *Mouchet v. Great Western Railw. Co.*, 1 Railw. Cas. 567.

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lands till the first instalment, then due, was paid; the Vice-Chancellor (Sir L. Shadwell) overruled a demurrer to the bill; and Lord Chancellor Cottenham, on appeal, affirmed the judgment, observing, that on the face of the bill there appeared such a case as would entitle the plaintiff to some relief, and that if he allowed the demurrer he should be saying that the company might go on the plaintiff's land, and give him for it only what a jury might award (1). Where, by a Railway Act, it was enacted that if the railway company should be desirous of purchasing part of any house, garden, *yard*, warehouse, building, or manufactory, and the owner should signify his inclination to sell the whole of such house, garden, *yard*, &c., he should not be compelled to sell part only, or less than the whole of such house, garden, yard, &c.; Vice-Chancellor Sir L. Shadwell held that a yard for bonding foreign timber, in which there were a deal shed and two buildings containing sawpits, was not a yard within the meaning of the enactment; and the Vice-Chancellor said that his opinion was, upon looking at the whole of the Act, that this extensive piece of ground, which was in no way connected with a house or building (any otherwise than as a deal shed might be called a building, which, for the present purpose, he thought it could not), or with a warehouse, or a manufactory, could not be said to be a yard within the meaning of the above enactment, and that he therefore thought that the company lawfully might take possession under the Act of part of the yard without being bound to take the whole of it; and, consequently, refused a motion for an injunction to restrain the taking possession (2). Where a Railway Act, by the 12th section, empowered the company to take lands for the purposes of the Act, and to enter upon lands adjoining to the railway, and to dig and use materials obtained therein, making full satisfaction for the lands, and for damage by reason of the execution of all or any of the powers thereby granted; and the 31st section enabled persons interested in such lands to receive payment for the value, and compensation for any damage by the severance of such lands, &c.; and the 32nd section provided for the impannelling of juries to assess the amount of the purchase

(1) *Stanley v. Chester and Birkenhead Railw. Co.*, 3 My. & Cr. 773; 1 Railw. Cas. 58; 9 Sim. 264.

(2) *Stone v. Commercial Railw. Co.*, 9 Sim. 621; 1 Railw. Cas. 376.

moneys and compensation; and the 53rd section enabled the company, upon payment, &c., of the money agreed upon or awarded for the purchase of any lands immediately to enter upon such lands; provided that before such payment, &c., it should not be lawful for the company to enter upon such lands for any of the purposes of the Act; and the 54th section provided that before taking temporary possession of any lands the company should agree with the owners or occupiers for an annual rent in respect thereof; and, if required, should give security for the payment of compensation for any permanent injury which might be sustained; and the company having entered upon lands of the plaintiff for the purpose of taking the subsoil to form an embankment, he filed his bill praying that they might be restrained from so doing until they should have agreed with him for a fixed annual rent during their occupation of the land, and given security for compensation; the Court held, that the acts complained of were not within the 54th section, but were, by the proviso of the 53rd section, brought within the conditions of the 12th section (1). When a railway company takes lands forming part of a house within 8 Vict. c. 18, s. 92, the owner can compel the company to take the whole of the other property comprised in the word "house," but not a portion only of it (2). A railway company having power to take land as they might think necessary for the purposes of the railway will be restrained from compulsorily taking land which does not appear to be wanted for making their line, unless the company produces more proof that it is really wanted than the mere affidavit of their engineer; and the purposes must be specified, so that the Court may judge if the land is *bonâ fide* required (3). But where a railway company required a landowner to sell them certain lands, which they were empowered by their Act to take for the purposes of their railway, and their engineer stated that they intended to use the land for the purpose of depositing spoil, or surplus earth, dug from the adjoining land, and materials used in and during the construction of the railway, and that it was uncertain whether they

Owner can compel company taking part of lands forming part of "house" within sect. 92, to take the whole, but not a portion.

Railway company having power to take land as they might think necessary, will be restrained taking compulsorily what does not appear to be wanted for the line.

(1) *Innocent v. North Midland Railw. Co.*, 1 Railw. Cas. 242. 33 L. J. (Ch.) 505.

(2) *Pulling v. London, Chatham, and Dover Railw. Co.*, 33 Beav. 644; (3) *Flower v. London, Brighton, and South Coast Railw. Co.*, 2 Dr. & Sm. 330.

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The Court will not restrain the execution of the works where a company acting *bonâ fide* has made a mistake as to the land they have valued; the Court will regard the injury to the public. Company restrained taking possession of land of infant (here) on the ground of want of proper service of notice.

Company let into possession on a contract to purchase, and having constructed line (in this case) not restrained continuing in possession until purchase money paid.

would require the land after the completion of the railway; the Master of the Rolls, Sir J. Romilly, refused a motion by the landowner for an injunction to restrain the company from taking the land (1). But upon appeal to the Lords Justices (11th of March, 1865), the order of the Master of the Rolls was discharged, and the motion was ordered to stand to the hearing, the defendants undertaking not to proceed under their notice to treat. Where a railway company, acting *bonâ fide*, has made a mistake as to the lands they have valued and taken possession of, and the question between the company and the landowner is merely one of value, the Court will not, by injunction, stay the works on the property taken; the Court, in such cases, has regard to the injury which may be done to the public (2). Where, by an Act of Parliament, it was enacted that a railway company should, within twelve months, give notice to an infant of the lands belonging to him which they might require to take, and it was declared that by the Earl of Harrington should be meant, during his minority, his testamentary guardian, and other proceedings were pending in which the infant was represented by a next friend, and the notice was, within the limited time, served upon that next friend, but it was not until after the expiration of twelve months that any notice was served upon the guardian; the Court held, that no notice had been given under the Act, and that the company must be restrained from taking the land (3). Where a railway company, having agreed to take certain lands at a specified sum for compensation, was let into possession, and constructed their line over it, giving a bond for payment of the purchase money on a future day, and default was made in payment of the bond; the Lords Justices, affirming a decision of the Master of the Rolls, held, that the landowner was not entitled to an injunction to restrain the company from continuing in possession of the land until they had paid the purchase money; Lord Justice Turner said if the company were destroying the property the plaintiff might be entitled to an injunction; but he had let them into possession, and they were

(1) *Lund v. Midland Railw. Co.*,
34 L. J. (Ch.) 276-77.

(2) *Wood v. Charing Cross Railw.*
Co., 33 Beav. 290.

(3) *Harrington (Earl) v. Metropolitan Railw. Co.*, 13 L. T. (N. S.) 583,
658.

only using the land for the very purpose for which he sold it to them. The plaintiff might, perhaps, be entitled to a receiver, but he did not think that he was entitled to such an injunction as he asked; and Lord Justice Cairns said that it appeared inconsistent in a suit for specific performance to apply to turn the purchaser out of possession, and that it would seem more proper to apply to have the money paid into Court (1). Although in *Cosens v. Bognor Railway Company* (2), where a railway company had taken land, and made a railway thereon, and afterwards leased the railway to another company; and part of the purchase money remained unpaid, and the landowner filed his bill against both companies, praying for payment of the money, or an injunction to restrain them from using the land; Lord Justice Sir J. L. Knight Bruce (Lord Justice Sir G. J. Turner, *diss.*) affirming a decision of Vice-Chancellor Sir J. Stuart, ordered that the first company should pay the money, and in default that both companies should be restrained from using the land. Upon a bill by unpaid vendors (the trustees of a charity) against two railway companies—the purchasers and their lessees, in possession of the land—for specific performance of the contract for payment of the purchase money, and that the companies might be restrained from continuing in possession of the lands until the agreement should have been performed, for a declaration that the plaintiffs had a lien as unpaid vendors, and that such lien might be enforced by a sale, and that a receiver might be appointed of the rents and profits of the real and personal estate of the purchaser; Vice-Chancellor Sir J. Stuart held, that the lessees were properly made parties, and decreed specific performance, and payment of the purchase money within three months, and declared a lien as against both companies, and gave leave, in case the money should not be paid, to apply for an injunction, and for the appointment of a receiver to enforce the lien, but said that a sequestration of the whole of the profits of the company would not be according to the usual course of the Court (3). In *Nelson (Lord) v. Salisbury and Dorset Junction Railway Company* (4), an injunction was

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But (here) company having made railway, restrained using land in default of payment of purchase money.

Unpaid vendors have a lien as against a railway company—purchasers of land for purchase money.

(1) *Pell v. Northampton and Banbury Junction Railw. Co.*, L. R. 2 Ch. 100; 12 Jur. (N.S.) 897.

(2) L. R. 1 Ch. 594; 36 L. J.

(Ch.) 104.

(3) *Winchester (Bishop of) v. Mid-Hants Railw. Co.*, L. R. 5 Eq. 17.

(4) 16 W. R. 1074.

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granted after a decree in a suit for specific performance to restrain a railway company from continuing in possession of land agreed to be sold until payment of the purchase money and arrears of rent-charge and costs. The agreement contained a clause providing that the land should revert to the owner in case of non-completion of the railway by a specified time, and the railway was completed and opened after the specified time. Where an injunction was sought to restrain a railway company from entering on land before payment of the purchase money, and they remained in possession three months, and then, and after the institution of a suit to restrain them from entering, paid the purchase money; the Master of the Rolls, Sir J. Romilly, held, that they must pay the costs of the suit (1). Where J. was lessee of land required by a company under a lease which provided that C., the lessor, might resume such land for the purpose of building, planting, accommodation, or otherwise; upon a bill by the lessee praying for an injunction against the railway company, or, in the alternative, for payment of an apportioned part of the sum awarded to the lessor, as compensation to himself; the Master of the Rolls, Sir J. Romilly, held, that after the company had given notice to treat for the land, C., the lessor, had no power to resume it by virtue of such proviso, and that the company (which had, after C.'s attempted resumption, ignored the lessee's claim, and had paid the whole of the compensation money awarded for the land to the lessor,) must pay the compensation to J., the lessee; the amount to be settled at Chambers, the company to pay the costs of the suit (2).

After company has given notice to treat, lessor of land cannot, by virtue of a proviso in the lease, resume it, and he is bound to pay part of compensation to lessee.

Commissioners of Sewers are entitled to restrain a railway company interfering with a natural deposit of beach, protecting from inundations of a tidal river.

20. Vice-Chancellor Sir W. P. Wood held, upon the construction of the 23 Hen. 8, c. 5, and the 3 & 4 Will. 4, c. 22 (enlarging the operation of the former Act, and giving additional powers to commissioners of sewers), that commissioners of sewers were entitled to restrain a railway company by injunction until the hearing from interfering with a natural deposit of beach forming a protection to the country from the inundations of a tidal navigable river within the survey of the commissioners; and this notwithstanding a purchase by the company from the lord of the manor,

(1) *Kensington (Lord) v. Metropolitan Railw. Co.*, 14 W. R. 754; 14 L. T. (N.S.) 580.

(2) *Johnson v. Edgware, Highgate, and London Railw. Co.*, 14 W. R. 416.

under parliamentary powers, of the spot in question (1), and very possibly "banks and walls, &c.," by tidal and navigable rivers, as well as by the sea-coast, are included in 3 & 4 Will. 4, c. 22 (2).

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21. A company incorporated for the purpose of making a railroad cannot, with the dissent of one of the shareholders, carry on a trade distinct from the purposes for which it was incorporated (3). But where a railway company had authority to keep steam-vessels for the purposes of a ferry, the Master of the Rolls, Sir J. Romilly, held that such vessels, when otherwise unemployed, might be used by the company for excursion trips to the sea (4). An Act of Parliament constituting a railway company is a contract between the company and the public, the performance of which the public has an interest in enforcing; and therefore a railway company, with the ordinary powers, was, at the suit of the Attorney-General, on the relation of a stranger to the company, restrained from carrying on the business of coal merchants, but not so as to prevent them selling their then present stock of coal (5). And the information may be filed without the certificate of the Board of Trade mentioned in the 7 & 8 Vict. c. 85 (An Act to attach certain Conditions to the Construction of future Railways, &c., and for other Purposes in relation to Railways), ss. 16, 17; and the 7 & 8 Vict. c. 85, and the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), do not take away the jurisdiction of this Court, or of the Attorney-General, to sue a railway company for breach of its powers (6).

A company incorporated for making a railroad cannot, with dissent of one shareholder, carry on a trade distinct from the purposes of incorporation.

An Act constituting a railway company is a contract between the company and the public.

A railway company restrained carrying on business of coal merchants.

22. Where an Act authorized the construction of a railway, and declared that nothing therein contained should prevent the owners, lessees, or occupiers of lands near the company's railway from making railways or roads across the company's railway, nor from using such railways or roads for the benefit of themselves and others to whom they might give leave, and in such way and for such purposes as they might require; and that the company should not be entitled to demand tonnage or compensation for making such rail-

Right (here) of making private railways across a public one and charging tolls.

(1) *Crossman v. Bristol and South Wales Union Railw. Co.*, 11 W.R. 981.

(2) *Ib.*

(3) *Forrest v. Manchester, Sheffield, and Lincolnshire Railw. Co.*, 30 Beav. 40; *v. S. C. post*, p. 854.

(4) *Ib.*

(5) *Att.-Gen. v. Great Northern Railw. Co.*, 1 Dr. & Sm. 154; 6 Jur. (N.S.) 1006; 29 L. J. (Ch.) 794.

(6) *Ib.*

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way, or for passing goods, persons, horses, carts, &c., along such railway; the Lords Justices, and Willes, J., held (reversing a decision of Vice-Chancellor Kindersley and Baron Channell), that an owner of adjoining lands who had constructed a new line over the company's railway was entitled to use his line of railway as a common railway carrier, taking tolls and charging fares for the same (1).

23. Where a reference had been made to assess the amount of compensation to a landholder for land to be taken by a company, and an award had been made, which had proceeded on the footing that two roads on the estates crossed by the proposed line would be left so as to oblige the company to erect two bridges over those roads, but the company afterwards gave notice of taking another piece of this land which, by an alteration in their original plan, would render the erection of one bridge only necessary; Vice-Chancellor Sir W. P. Wood held, that the award had not prevented the company from changing their original plan, the subsequent one being within the provisions of their Act of Parliament, and that for the taking of the land, of which the second notice had been given, the landholder could obtain compensation under the Railways and Lands Clauses Acts (2).

Company (here) entitled to change their original plan of line notwithstanding an award of compensation.

Preference bondholders being preferred creditors by statute, with a lien, may restrain directors applying earnings except in the order appointed.

24. The Canadian statutes, 12 Vict. c. 29, 18 Vict. c. 174, and 19 & 20 Vict. c. 111, having placed the preference bondholders of the Grand Trunk Railway Company in the position of preferred creditors having a lien on the road and all the works and property of the railway, the bondholders can institute a suit in Equity to restrain the directors from applying the earnings of the railway in any other way than in the order appointed by the Acts, and the bondholders, having such lien, are not obliged to submit to payment of past debts, which the directors have neglected to discharge (3).

There is no principle of public policy which renders void a *bond*

25. With regard to the interests of the public, there is no principle of public policy which renders void a traffic agreement between two lines of railway for the purpose of obtaining a uniform

(1) *Hughes v. Chester and Holyhead Railw. Co.*, 6 L. T. (N. S.) 709; 31 L. J. (Ch.) 97; 8 Jur. 10 W. R. 661.

(N. S.) 221.

(3) *Herrick v. Grand Trunk Railw. Co.*, 7 U. C. L. J. 240.

system of traffic management, and avoiding competition; and though a public company, constituted for a particular purpose, will not be allowed to apply its funds in a manner not sanctioned by the constitution of the company, the Court will not interfere with a traffic agreement between two lines of railway to divide the net earnings in certain definite proportions. And where two groups of railway companies, being respectively the owners of independent conterminous routes, agreed to divide the profits of the whole traffic in certain fixed proportions, calculated on the experience of the past course of traffic, Vice-Chancellor Sir W. P. Wood held, that such an agreement, being *bonâ fide*, was not *ultra vires* (1). But the same Judge, in *Charlton v. Newcastle and Carlisle Railway Company* (2), held, that an agreement between two railway companies that they shall work together, and that the profits shall be shared, so as to give a certain percentage to each, is beyond the powers of the companies, and illegal (3). The Brighton Company and the South Western Company became jointly entitled to a line of railway under an Act of Parliament, in 1847, by which this joint line was placed under the management of a joint committee. By this Act each of the two companies might use the joint line for all purposes necessary for the traffic of the same respective company. The South Western Company afterwards, without parliamentary authority, entered into agreements with the Portsmouth Company, by which the South Western Company was to have the exclusive use of the line of the Portsmouth Company, paying a certain sum a year. But the Court held, that the Act of 1847 did not create a joint tenancy, carrying with it the right of using for every kind of traffic a station appurtenant to the joint line (and belonging to the Defendants and plaintiffs jointly), and that the South Western had no right to use it except for what was properly traffic of that company (4); and it also held, that the agreement between the South Western Company and the Portsmouth Company was *ultra vires* and illegal, and that the conveyance of passengers and goods under

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fide traffic agreement between two lines for a uniform management and avoiding competition.

One of two joint companies restrained (here) using a joint station for any traffic from a third railway, with which company the latter joint company had entered into a traffic arrangement agreement.

(1) *Hare v. London and North-Western Railw. Co.*, 2 J. & H. 80; 30 L. J. (Ch.) 817.

(2) 5 Jur. (N. S.) 1096; *v. ante*, p. 800.

(3) See now as to working agree-

ments between railway companies, "The Railway Clauses Act, 1863," 26 & 27 Vict. c. 92, part 3.

(4) *London, Brighton, and South Coast Railw. Co. v. London and South-Western Railw. Co.*, 4 De G. & J. 362.

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Injunction
refused (here)
to restrain one
company per-
mitting
another to use
a station of
the plaintiff
company.

them did not constitute traffic which could be considered traffic of the South Western Company within the meaning of the Act of 1847 (1); and therefore that the Brighton Company was entitled to an injunction restraining the South Western Company from using the joint station for the purposes of any traffic destined for or coming from the Portsmouth Railway, or any part thereof (2). The Court refused to restrain one railway company (the defendants) from using or authorizing or permitting the Great Northern or any other railway company to use the station of another company (the plaintiff) (the defendants having agreed with the Great Northern Company for the latter to work the traffic on the defendant's line) under an agreement which had been made between the two companies (plaintiff and defendants) before a connection had been established between the company using the station (the defendants) and the Great Northern, which brought this latter company into competition with the company to whom the station (the plaintiff's) belonged, it not being clear that the right of the defendants to use the station was not intended to be given by their special Act, the agreement being open to the construction that the extent and terms of the station accommodation were from time to time to form the subject of reference to arbitration, and there being no award specifying the time at which it should determine; the rival or competing company having also been in existence at the time the agreement was made, and the plaintiffs being therefore at that time aware of the possibility of the competition afterwards arising; and, supposing the question to be doubtful, the balance of convenience preponderating against granting the injunction (3). Where, on the purchase of land by a railway company in 1838, the company covenanted with the landowners that a piece of the land purchased should for ever thereafter be used as a first-class station; and the station was built, and the railway was completed in 1842; and the railway company was afterwards made part of a company with a much greater length of railway; and in 1869 the landowner filed a bill

(1) *London, Brighton, and South Coast Railw. Co. v. London and South-Western Railw. Co.*, 4 De G. & J. 362.

(2) *Ib.*

(3) *Midland Railw. Co. v. Ambergate, Nottingham, Boston, and Eastern Junction Railw. Co.*, 10 Hare, 359.

to compel the company to build a larger station, and to stop all trains at that station; the Court of Appeal (Lord Chancellor Hatherley and Lord Justice Giffard) held (partly affirming and partly reversing a decision of Vice-Chancellor James) that as the existing station had not been objected to, and had remained for many years, and as the passengers were not numerous, the Court would not compel a larger station to be built; but that as many trains as stopped at any station between the termini of the original railway, excepting mail, express, and special trains, must stop at this station (1). A first-class station means a station at which all trains other than express, mail, or special trains are in the habit of stopping (2). Where, therefore, a railway company had taken land with respect to which there was a covenant existing "that the land should for ever thereafter be used as a goods depôt, and as a first-class station for taking up and setting down passengers travelling along the company's line of railway, and the company had only allowed third-class, or merely local trains, to be advertised to stop at the station built on the land, and there was no goods depôt provided; the Court held, that the company was bound by the covenant; and an injunction was granted to restrain them from allowing the ordinary fast trains to pass the station (3). Where three railway companies under an Act of Parliament were entitled to the joint use of a station, and one of them, as it was alleged by one of the others, unfairly used the station to the detriment of such other company, and this last company filed a bill to restrain the use of the station by such other company except in accordance with the Act, a general demurrer to the bill, on the ground chiefly that a committee of the three companies was under the Act the proper tribunal, was overruled (4). Where a railway company had agreed with contractors that the contractors should work the line, and provide engine drivers and other workmen, and keep the engines and rolling plant on foot and in repair at a specified remuneration, proportional to the traffic, upon

A first-class station means a station at which all trains other than express, mail, or special trains, are in the habit of stopping; and company restrained allowing ordinary fast trains to pass station in breach of covenant.

Injunction refused to restrain a company determining a contract for working a line, &c., and resuming pos-

(1) *Hood v. North-Eastern Railw. Co.*, 21 L. T. (N. S.) 258.

Co., L. R. 5 Ch. 525; 17 W. R. 1085;

(3) *Ib.*

18 W. R. 473; 19 W. R. 523; 23 L. T.

(N. S.) 206, 970; L. R. 8 Eq. 666.

(4) *Mid-Wales Railw. Co. v. Cambrian Railw. Co.*, 21 L. T. (N. S.) 16.

(2) *Flood v. North-Eastern Railw.*

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session of line,
for non-com-
pliance with
impracticable
requisitions—
Quære
whether such
a contract is
legal.

The Court will
not compel one
party to em-
ploy another
as his con-
fidential
servant.

A charge of
tolls for use of
a line, upon
tolls of an-
other line, is
(without par-
liamentary
power) of too
doubtful
legality to be
enforced by
injunction.

the lines, but that they should not be liable to repair the permanent way, or for losses arising from the accidents to passengers, or losses on goods, except from their own negligence; and that the contract should be in force for seven years, but with a proviso for its determination if the contractors did not, within forty-eight hours after notice given by the company, obey the instructions contained in such notice; the Lords Justices held, affirming the decision of Vice-Chancellor Sir W. P. Wood, that the agreement was not of such a kind as to be enforceable by an injunction restraining the company from determining the contract, and resuming the possession of their line for non-compliance with impracticable requisitions, on the ground, amongst others, that the Court was asked to compel one party to employ against his will another as his confidential servant for duties with respect to the performance of which the utmost confidence was required; and the Lord Justice Knight Bruce said that he could not persuade himself that such an agreement was not illegal, or not against the policy of the law, though he did not intend to represent himself as entertaining a confident opinion upon the point; and Lord Justice Turner also said he entertained some doubt as to the legality of the contract (1). Where a railway company had contracted with another for the use of the line of the latter for a term at graduated tolls, according to the tonnage carried, which were to be a charge on the tolls and dues of the former company, and that upon non-payment the latter might impound such dues as in distresses for rent, and the former company had no express parliamentary power thus to charge their tolls; the Lords Justices held, that the charge was of too doubtful legality to be enforced by an injunction to restrain the former company from paying a dividend to its shareholders until the sums due upon the agreement were provided for, no case being made out shewing a probability of there being no fund forthcoming to answer the demand at the hearing, and the Court left the plaintiffs to proceed by action or distress, their remedy being at law (2). The object of the 87th section of the Railways Clauses Consolidation Act (8 Vict. c. 20) is

(1) *Johnson v. Shrewsbury and Birmingham Railw. Co.*, 3 De G. M. & G. 914. *River Dun Co. v. Great Northern Railw. Co.*, 3 De G. M. & G. 576; 22

(2) *South Yorkshire Railw. and L. J. (Ch.) 761.*

to enable one railway to contract for the passing of their trains to the limits of the railway of another company, with the incidents which ordinarily attach to such power of passing, including that of stopping at the stations on the line, and carrying passengers and goods to and from such stations. But it does not enable one railway company, under colour of passing over the line of another company, to carry the whole of the traffic of the other railway over which they may agree to pass (1). An agreement by one railway company for the payment to another of such an amount as will, after answering all expenses and liabilities, furnish a certain dividend on the paid-up capital of such other company, is not an agreement for the payment of a toll within the meaning of the 87th section of the Railways Clauses Consolidation Act (2). In this case where, by an agreement between the G. N. Railway Company and the A. Company, the G. N. Company were, first, to bear harmless the A. company against all their guaranties to canals or otherwise; secondly, the G. N. Company were, until an Act of Parliament could be obtained, to work the traffic of the A. company, and to pay them such toll as should, after answering the expenses and liabilities of the A. Company, pay a dividend of 4 per cent. on the paid up capital of the A. Company, and after obtaining the Act of Parliament the G. N. Company were to guarantee 4 per cent. to the A. shareholders; and thirdly, the G. N. Company were, in the next session of Parliament, to apply at their own costs for an Act of Parliament to ratify this agreement, and to keep on renewing such application, if unsuccessful, always at their own expense; and the Railways Clauses Consolidation Act, 1845, was embodied in the Acts of the G. N. and A. Companies. On a bill by two shareholders of the G. N. Company to restrain their directors from carrying out this agreement, or from defraying out of the funds of the company the costs of such application; the Court held, that the arrangement was not within the purview of the Railways Clauses Consolidation Act, 1845, s. 87, and that the payments mentioned in the agreement were not tolls

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Sect. 87 of the Railways Clauses Consolidation Act does not enable one railway company to carry the whole of the traffic of another railway over which it may agree to pass. An agreement by one railway company to pay another such an amount as will, after expenses, &c., furnish a certain dividend upon capital, is not an agreement for payment of toll within sect. 87 of the Railways Clauses Consolidation Act.

(1) *Simpson v. Denison*, 10 Hare, 51; *vide* as to this point, *Winch v. Birkenhead, Lancashire, and Cheshire Junction Railw. Co.*, 5 De G. & Sm. 562; *ante*, p. 801.
(2) *Ib.*

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within the meaning of the section (1). A railway associating, allying, and connecting itself with another, does not thereby become equitably "amalgamated" with it; and although an agreement to amalgamate as from a time passed may possibly in Equity amount to an amalgamation, yet an agreement to do so at a future period, will not, until that period arrives (2). And where, pending the progress of a bill through Parliament authorizing the S. V. Company to lease their line to the N. W. Company, the bill was opposed by the S. B. Company, and upon a compromise a clause was inserted securing to the S. B. Company the use of part of the line and the joint use of a station, subject to the cesser of these rights in the event of the S. B. Railway Company being leased to or amalgamated with a fourth company, viz., the G. W., who were rivals to the N. W. Company, and at this time the S. B. Company was under no engagement to the G. W. Company; but subsequently, however, those two companies entered into agreements, giving facilities and preference to each other's traffic, and agreed to amalgamate at a future time, if the sanction of Parliament could be obtained; the Court held, that this was not such a change of circumstances produced by the conduct of the S. B. Company as to exclude them from equitable relief by injunction for the enforcement of the right of user conferred on them by the Act (3).

Though the Court can prescribe regulations for management and use of a joint station, it will not do so except there is grave occasion. The Court can, if necessary, make partition of station, and appoint receiver and manager. But Court will not interfere where there are arbitration provisions, unless this remedy fails.

Though the Court may interfere between two railway companies entitled to the joint use of a station by prescribing regulations for its management, yet such interference is not to take place without grave occasion; and the Court will in a necessary case endeavour to find its way to a partition of the station, and appoint a receiver and manager, if necessary; but where provisions exist for the settlement of disputes on the above subjects by arbitration (as in this case), the Court will withhold its interposition until the remedy thus provided has been resorted to; and the plaintiffs were directed to be at liberty to bring such action, or take proceedings by arbitration, as they might be advised, the motion for an injunction to stand over until further order (4). Where in 1848 the East

(1) *Simpson v. Denison*, 16 Jur. 828. *Railw. Co. v. Stour Valley Railw. Co.*,

(2) *Shrewsbury and Birmingham* 2 De G. M. & G. 866.

(3) *Ib.*

(4) *Ib.*

Lincolnshire Railway Company had agreed with the defendants that a station on the defendants' line should be used equally by both companies, but should be subject to the bye laws of the defendants, and that a committee of three from each board should be appointed to arrange the working of the traffic, &c.; that the cost and maintenance of the station and the working should be borne by the two companies equally; that the defendants should afford to the East Lincolnshire Railway Company facilities for access to the Great Grimsby Docks; and that the East Lincolnshire Railway Company should give up a piece of land to the defendants; that the defendants should have the right of running with their engines, &c., on the East Lincolnshire line between Great Grimsby and Louth; and that the East Lincolnshire Railway Company should have the same right over the defendants' line between Great Grimsby and New Holland, paying in either case 66 per cent. of the gross receipts to the company whose line was used; and that each company should provide station accommodation for the other at New Holland and Louth respectively for three years as therein mentioned; and the East Lincolnshire line of railway became vested in the plaintiffs, as lessees thereof, for 999 years; and disputes arose between the companies, which ended in the defendants' preventing the plaintiffs from running their engines, &c., on the line between Great Grimsby and New Holland, and giving them a formal notice to determine the agreement; on motion, an injunction was granted to restrain the defendants from obstructing the plaintiffs running their engines, &c., over that part of the defendants' line mentioned in the agreement; and though the agreement contained no words of succession or restriction, yet the Court held, that these contracts were not mere licenses revocable and determinable at the will of either party, but were agreements which conferred rights of a permanent nature on the companies; that the terms of the contract were not too vague, but that the user conceded was one consistent with the proper engagement of the railway, the subject matter of the contract, and with the rights of the granting party; and an agreement to grant an easement of this nature to a corporate body need not be by deed and may be permanent, although it was to the company only, and not to the company and their successors;

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Court will restrain the obstructing of engines running by agreement over another line.

Though such agreements contain no words of succession, they confer rights of a permanent nature.

An easement of this nature need not be by deed.

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The Court will restrain breach of negative agreement, although it cannot enforce the whole agreement. Meaning (here) of "local traffic." The Court refused an injunction to restrain a company from running certain trains without stopping at a certain station for refreshment, in violation of a contract; but directed the company to keep accounts, and to pay what found due to plaintiff for the injury.

and this Court will grant an injunction restraining the defendants from acting contrary to a negative agreement, although it cannot specifically enforce the performance of the whole of the agreement (1). Where two railway companies had given mutual running powers to each other over parts of their respective lines, with a stipulation that local traffic should be respected; Vice-Chancellor W. M. James held, that by "local traffic" was meant the traffic between two stations, both being on one of the lines over which the running powers extended (2). Where a bill was filed to restrain a company from running certain trains without stopping at the S. Station for the purpose of refreshment of passengers, in violation of a contract between the plaintiff and the company for that purpose; and upon the motion for the injunction being made, the Vice-Chancellor, before granting it, required the plaintiff to establish his right at Law, the company undertaking to keep certain accounts; and proceedings were accordingly taken at Law, which resulted in favour of the plaintiff; and upon the application for an injunction being thereupon renewed, the company asked for a case to a Court of Law, which they, by inadvertence, had omitted to have tried under the former proceedings, and they resisted the injunction being granted in the meantime; and the Vice-Chancellor thought the company entitled to a case, but granted an interim injunction to the plaintiff. Upon appeal the Lord Chancellor discharged that part of the Vice-Chancellor's order which granted an interim injunction, and in lieu thereof required an undertaking from the company, not only to keep the accounts which had been directed in the first instance, but also to pay what might be found due to the plaintiff for the injury he might sustain by their continuing to run their trains in the manner complained of. A case was accordingly taken to Law, and the opinion thereon was in favour of the plaintiff; but pending the proceedings at Law the plaintiff's interest under the covenant ceased, and the injunction became unnecessary. The Court, on motion by the plaintiff for the costs of the proceedings at Law and in Equity and for a reference

(1) *Great Northern Railw. Co. v. Manchester, Sheffield, and Lincolnshire Railw. Co.*, 5 De G. & Sm. 138; 16 Jur. 146; *et vide* on the last point, *Lumley v. Wagner*, 5 De G. & Sm. 485; 1 De G. M. & G. 604; *et pp.* 205, 207, 214, *ante*.

(2) *Midland Railw. Co. v. Manchester, Sheffield, and Lincolnshire Railw. Co.*, 22 L. T. (N. S.) 601.

to take the accounts which the company had been ordered to keep, made an order for a reference, but reserved its direction as to the costs, on the ground that they might possibly be affected by the result of the account (1). Where the proprietor of a pier erected under the powers of an Act of Parliament, which were to be exercised during a certain limited period, was authorized by the Act to demand certain specified tolls for the use of the pier when completed; and by an agreement between him and a railway company he agreed to complete his pier at a considerably earlier time than he was bound to do by the Act, and the company agreed to complete a branch railway to the pier by the same time, but the agreement contained no stipulations as to opening the pier or railway, or as to the terms on which the pier was to be used; and the owner of the pier completed it accordingly, but refused to permit the railway company to use it except upon terms to which the company declined to accede; Vice-Chancellor Sir J. L. Knight Bruce refused to grant on motion an injunction restraining the owner of the pier from obstructing the use of it by the company at the statutory tolls of the Act authorizing the construction of the pier. The Vice-Chancellor said what he might have done had this case come before him on an information, or on a bill and information, it was not necessary for him to say, nor was he sure; but as the case stood he was of opinion that the Court ought not to interfere in favour of the plaintiffs, and that he was unable to view the damage as irreparable, or as not susceptible of pecuniary compensation, if the plaintiffs made out their title to it (2). Upon an information filed praying for an injunction to restrain the imposition by the B. and B. Junction Railway Company of unequal charges between the termini at D. and H. (the company charging passengers of the M. C. Railway Company 8s. and passengers by the L. & B. 2s.), and it being admitted that the charge of 8s. did not exceed the rate allowed by their Act; the Lord Chancellor held, on motion for an injunction, that the clauses of their Act relating to tolls were only meant to prevent the exercise of a monopoly, to the prejudice of one passenger or carrier in favour of another; and that even if

(1) *Rigby v. Great Western Railw. Co.*, 19 L. J. (N.S.) Ch. 470; 14 Jur. 710; and see S. C. at Law, 4 Ex. 220.

(2) *Furness Railw. Co. v. Smith*, 1 De G. & Sm. 299.

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this Court had jurisdiction in such a case, it would not interfere unless it were clear that the public interest required it; and that in this case, it being admitted that the higher charge was not more than the Act permitted, it did not appear that the public were prejudiced by the arrangement, and the motion was refused with costs (1). Where the intention of Eton College to exclude the Great Western Railway Company from having a station within three miles of Eton being admitted or apparent, and they having procured to be introduced into the Act clauses prohibiting the company from forming, making, or laying down a railway or tram or other road to the south of the line, approaching within three miles of the college, and from making or constructing a depôt, station, or yard, &c., within three miles of the college, without the consent of the college; and the company having set down and taken up passengers without such consent within the prohibited space; the Court held, that the words did not restrain them from so doing, the company being entitled to do all the Act does not upon a strict construction restrain them from, and refused an injunction (2).

The Court held (here) that a company was entitled to do all its Act did not, upon a strict construction, restrain the company from; and could put down and take up passengers (here) without consent, within a space prohibited as regards a station, &c.

The Court will dismiss a bill if suit illusory, (here) being by a rival company, and not in fact, by plaintiff.

26. Where a suit was illusory, and not in fact the suit of the plaintiff, but of a rival company, Lord Chancellor Westbury on this ground dismissed the bill. In this case a railway company was required to keep up a ferry communication on a river, and, for this purpose, was obliged on certain days to employ a much larger number of steam-boats than was required upon ordinary occasions. The company employed the steam-boats when not required for the purposes of the ferry in running excursion trips; and a bill was filed by a shareholder on behalf of himself and other shareholders complaining that the company was acting *ultra vires* in so employing the vessels; the plaintiff was a large shareholder of a steam navigation company which was affected by these excursion trips, and the suit was instituted by the direction of the latter company, who had indemnified the plaintiff; the Master of the Rolls, Sir J. Romilly, had also dismissed the bill on the ground that the company was not acting *ultra vires* (3).

(1) *Att.-Gen. v. Birmingham and Derby Junction Railw. Co.*, 2 Railw. Cas. 124.

(2) *Provost, &c., of Eton College v. Great Western Railw. Co.*, 1 Railw. Cas. 200; 3 Jur. 163.

(3) *Forrest v. Manchester, Sheffield, and Lincolnshire Railw. Co.*, 4 De G. F. & J. 126; 7 Jur. (N. S.) 749, 887; 9 W. R. 818; 30 Beav. 40; *v. S. C. ante*, p. 843.

27. Where a railway company, over whose line another railway company has running powers, is empowered to make regulations as to the construction of the carriages to be used on the railway, the onus lies upon the company having the running powers to shew that the regulations are unreasonable and unnecessary; and the fact of the regulations having been wholly or in part relaxed in the past is no reason for the Court to interfere to restrain them from being strictly enforced in the future (1).

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The onus lies on a company having running powers to shew that regulations as to the construction of carriages are unreasonable, &c.

28. Notices by railway companies to take land cannot be treated higher than contracts, and after great delay in proceeding on such notices they will be considered as abandoned (2). And where notice to take part of a property had been given by a company ten days before the expiration of their compulsory powers, and a counter notice had been given by the landowner requiring the company to take the whole, and the company did not follow up their notice, but, fourteen months afterwards, gave the landowner notice of an intended application to Parliament to abandon the undertaking, but in this they did not succeed; and nineteen months after the first notice the company served the plaintiff with a further notice of their intention to summon a jury to assess the value of his lands; and the landowner filed a bill for an injunction, stating that the original notice was not *bonâ fide* given, that the company in their subsequent proceedings, had treated the notice as abandoned, and that in the belief of such abandonment he had forborne taking proceedings; the Master of the Rolls, Sir J. Romilly, held upon demurrer that the landowner was entitled to relief, and granted an injunction (3). But a company may abandon a notice given by them to take part of a property with the intention of taking lands under the compulsory powers conferred upon them, upon being required to take the whole, and such notice, without some act to obtain possession, is not a contract binding on the company (4).

Notices by companies to take land cannot be treated higher than contracts, and after great delay will be considered as abandoned.

A company may abandon a notice to take part upon counter notice to take whole. Such notice without some act to obtain

possession is not a contract binding on company.

29. A railway company in making their line cut off a small

Sect. 94 of the
Lands Clauses

(1) *Rhymney Railw. Co. v. Taff Vale Railw. Co.*, 29 Beav. 153; 4 L. T. (N. S.) 534.

(3) *Ib.*

(4) *King v. Wycombe Railw. Co.* 28 Beav. 104; 6 Jur. (N. S.) 239; 29

(2) *Hedges v. Metropolitan Railw. Co.*, 28 Beav. 109.

L. J. (Ch.) 462.

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Consolidation Act is not confined to lands not in a town, &c.; therefore Court can compel sale of severed parts, though in a town, and not compelled to make communication.

portion of the land of A.; A. required the company to make a communication between the severed parts; but, upon an action against the company for not making a communication between the small portions of the intersected lands, as required by sect. 93 of the Lands Clauses Consolidation Act, it being found the lands were situate in a town, it was held that the averment of the company that it was within a town was immaterial, and therefore that, notwithstanding the finding, the company was entitled to the benefit of the 94th section, and that the operation of the 94th section of the 8 Vict. c. 18, was not confined to lands not situate in a town or not built upon, but applied also to land situate in a town, and that therefore the company could compel A. to sell the severed parts of his land, and was not bound to make the communication required (1).

30. Where a railway company after serving notice to take land, agreed in writing with the owner to accept the title, and the conveyance was executed by him and delivered to his solicitors as an escrow, with a written authority to the company to pay the money to them; and the owner died, having made a will and appointed executors; and the company requiring the land, but the executors not having proved, paid the money into the bank under the 8 Vict. c. 18, and took possession, and the executors filed a bill to restrain such taking possession; Vice-Chancellor Sir R. T. Kindersley held, that though it appeared to him that the escrow could have been made effectual upon the condition upon which it was authorized to be delivered, yet the authority to the company to pay the purchase money to his solicitors died with the owner by whom it was given, and that there being a contract the case was withdrawn from the operation of 8 Vict. c. 18; but the Court refused the injunction on the terms of the company bringing the purchase money and interest provided for by the contract into Court (2).

31. A registered shareholder in a railway company, which was afterwards incorporated with a new company by an Act of Parliament enacting that every registered shareholder in the old

(1) *Eastern Counties Railw. Co. v. Marriage*, 9 H. L. C. 32; 7 Jur. and *London and Blackwall Railw. Co.* (N.S.) 53; 31 L. J. (Ex.) 73.

(2) *Newton v. Metropolitan Railw. Co.*, 10 W. R. 102.

company should be deemed to hold a share in the new company, to be called a deferred share, and entitled, on demand, to receive a certificate for such deferred share, was held (having been a registered shareholder in the old company) entitled to sue to protect the funds of the new company in which the old was incorporated, although he had not exchanged his shares, or received a certificate as a shareholder in the new company (1).

32. Where the promoters of a new undertaking (the incorporation of an old with a new company) signed the subscription contract for sums (constituting the parliamentary deposit), which the directors of the old company represented to Parliament as out of their own funds, but which in fact they borrowed, and afterwards sought to charge against the funds of the new company; Vice-Chancellor Sir J. Stuart, at the instance of a shareholder of the old company, restrained by injunction such application, charging, or debiting of the funds with the deposit, or any sums paid for calls made in respect of the amounts mentioned in the said contract (2).

Promoters of new company, directors of old, incorporated with new company, restrained charging funds of new company with the parliamentary deposit.

33. Where by a clause in a Railway Act (similar to the 76th section of the Railway Clauses Consolidation Act), owners or occupiers of land adjoining or near the railway might lay down or extend on their own lands, or on lands on the sides thereof belonging to the company, any collateral or continuous branch from such lands to communicate with the railway for the purpose of bringing carriages upon or across the same; but all the openings and communications for that purpose were to be made at such places as might, so far as practicable, be most convenient to all the parties interested, and so as not to endanger the safety of persons travelling on the railway; and in case of difference as to the proper places for the openings, they were to be determined by two justices of the peace; provided always, that the company should not be bound to make any such opening where they should have erected any building station or yard, &c; the Lords Justices, affirming a decision of Vice-Chancellor Sir W. P. Wood, held, that the assent of the company to an opening being made at a station was not in the nature of a license, but an actual right conferred by the Act, and could not be revoked; and granted a perpetual injunction to restrain

Company restrained (here) from obstructing a siding communication (here an opening at a station) between the railway and a wharf.

(1) *Spackman v. Lattimore*, 3 Giff. 16; 9 W. R. 229.

(2) *Ib.*

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An incorporated company standing by and permitting works is affected with knowledge and acquiescence the same as an individual. The Court will enforce an indefinite agreement between a company and an individual for user by individual of line, where actual user has removed difficulty as to the terms.

the company from obstructing a siding communication between the railway and a wharf belonging to the plaintiff (1).

34. Where an incorporated company stands by and permits expensive works to be executed at the spot where its premises are situate and its operations carried on, the effect, for all purposes of knowledge and acquiescence, will be the same as in a case of an individual (2). In this case the plaintiff, a shipbuilder, in 1855 submitted to the directors of a railway company a project for a private branch line and communication with the defendants' railway, to be constructed at his own cost and for his own accommodation, to which the directors expressed their assent and agreement generally, but the terms and details were left for future arrangement. In 1856 he, at considerable cost, constructed the branch and a tunnel, but the company prohibited the user until a definite understanding should be come to; however, the Vice-Chancellor in his judgment intimated that at this time the company was bound to assent to reasonable terms, and that the Court, if possible, would have enforced the completion of the arrangement, unless the difficulty as to the tolls should have proved too great for the Court to solve. But, after some discussion, terms as to tolls and other matters were proposed by the plaintiff, and the traffic was continued on the basis of the plaintiff's memorandum of terms, and payment made by the plaintiff for the carriage of goods during two and a half years, but no agreement was ever signed by two directors; the directors ultimately insisted on terms originally suggested by them before the user commenced, and then objected to by the plaintiff; and on the plaintiff declining to make an agreement at variance with the terms on which the user had been enjoyed, the company, at the end of the two years and a half, on the ground that there was no contract under seal, gave notice to the plaintiff that every agreement between them, if any ever existed, was at an end, and proceeded immediately to stop up the communication and to obstruct the traffic; but Vice-Chancellor Sir W. P. Wood held, upon demurrer, that there was an indefinite agreement in 1855 for a user on reasonable terms; that the actual user had removed all difficulty about what terms were reasonable,

(1) *Bell v. Midland Railw. Co.*, 3 De G. & J. 673.

(2) *Laird v. Birkenhead Railw. Co.*, Joh. 500; 29 L. J. (Ch.) 218.

and that the plaintiff was entitled to specific performance on the basis of the unsigned memorandum, on the terms of which the user had been permitted (1).

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35. A mortgage for securing money borrowed by a railway company, according to the form in Schedule C. annexed to the Companies Clauses Consolidation Act (8 Vict. c. 16), comprises the lands as well as the rails and chattels of the company, and is entitled to priority over an elegit sued out against the company by a judgment creditor thereof (2). Where, therefore, a railway company borrowed money from various persons on mortgage, according to this form C., Vice-Chancellor Sir J. Stuart, at the instance of a mortgagee who sued on behalf of himself and all other the mortgagees of the company, restrained the sheriff from delivering legal possession of the company's lands and rails to a creditor of the company, who was the contractor who had constructed the railway, and had obtained judgment against the company, and had sued out an elegit thereon (3).

Mortgage in form in Schedule C. of Companies Clauses Consolidation Act comprises lands as well as rails and chattels, and is entitled to priority over an elegit.

36. In *Stockton and Darlington Railway Company v. Brown* (4) Lord Cranworth said he thought it clear that when the Legislature authorized a railway company to take for the purposes of their undertaking any lands specially described in their Act, it constituted them the sole judges as to whether they will or will not take those lands, provided that they took them *bonâ fide*, with the object of using them for the purposes authorized by the Legislature, and not for any sinister or collateral purpose. And a dispute having arisen in this case between a company and a landowner as to the right of the former to take some of the lands of the latter alleged to be necessary for the purposes of the company, and the Lords Justices having referred the question to an engineer, whose opinion was in favour of the landowner; the House of Lords, reversing a decision of the Lords Justices, and affirming that of Vice-Chancellor Sir W. P. Wood, held, that neither the opinion of the engineer nor of the Court could curtail the power of the company in respect to the quantity of land which the company *bonâ fide* acting under its statutory powers, sought to obtain (5).

A railway company authorized to take lands specially described in their Act, are thereby constituted the sole judges whether they will or not take those lands, and the Court cannot curtail that power where the company acts *bonâ fide* under its statutory powers.

(1) *Laird v. Birkenhead Railw. Co.*, 29 L. J. (Ch.) 385; 6 Jur. (N.S.) 8 Joh. 500. 1010; 2 L. T. (N.S.) 112.

(2) *Legg v. Mathieson*, 2 Giff. 71; (3) *Ib.*

(4) 9 H. L. C. 246; 6 Jur. (N.S.) 1168; 8 W. R. 708. (5). *Ib.*

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No authority (here) to take lands only required for excavating materials.

A company substituted by arrangement as defendant to an action by landowner originally against chairman of provisional committee, thereby adopts an agreement between landowner and chairman, and injunction (here) to restrain proceeding with railway in default of performing such agreement to take lands, &c.

Company restrained as assessing value of land upon a notice to treat, where a committee of the subscribers applying for the Act had agreed with a

37. Where a Railway Act empowered a company to make and maintain the works mentioned in it, and to enter upon, take, and use such of the lands specified in the plans as should be necessary for such purposes; the Lords Justices, affirming a decision of Vice-Chancellor Sir J. Stuart, held, that the provision did not authorize the company to purchase compulsorily and permanently in fee land required only for the purpose of excavating materials therefrom, although within the limits of deviation, and the company were restrained from taking steps to have the value of such land assessed (1).

38 Where a landowner withdrew his opposition in Parliament to a Harbour and Railway Bill on an agreement with the chairman of the provisional committee that the company would take his land on certain terms, and after the passing of the Act the landowner brought an action for breach of the agreement against the chairman, representing the promoters, which was stayed on the company being made (by arrangement) defendants to a new action, and suffering judgment for the demand; the Lords Justices, differing from the Master of the Rolls, held that the company thereby adopted the agreement, whether it would have been otherwise binding on them or not, and were precluded from objecting that the promoter (the chairman of the provisional committee) had no authority to bind the company, or from objecting that the consideration for the agreement (so far as regards the withdrawal of opposition in Parliament, and that the company should pay the costs of the landowner's opposition to the bill), was, as alleged, partly illegal; and the Lords Justices held that the plaintiff, the landowner, was entitled to an injunction restraining company from proceeding with the railway in default of performing the agreement (2). And where the committee of certain subscribers applying for an Act to authorize the formation of a railway agreed with the plaintiff, a peer of Parliament, through whose estates the railway had to pass, that in consideration of his withholding his opposition to their bill, the incorporated company, in the event of the railway being, under the power of their Act, made to pass through the

(1) *Eversfield v. Mid-Sussex Railw. Co.*, 3 De G. & J. 286; 1 Giff. 153.

(2) *Williams v. St. George's Har-*

bour Co., 2 De G. & J. 547; 24 Beav. 339; 4 Jur. (N. S.) 1066; 27 L. J. (Ch.) 691.

plaintiffs' estates in the line laid down on their parliamentary plan should, previous to entering thereon, pay to the plaintiff the sum of £120,000 for the value of the land and for compensation, and that the company should, within three weeks after their incorporation, ratify the agreement; and the plaintiff withheld his opposition to the bill, and it passed into an Act, and the incorporated company refused to ratify the agreement; and, being empowered by their Act to take compulsorily the plaintiff's land in the line mentioned in the agreement, served on him a notice to treat for the same; the Court granted an injunction restraining the company from proceeding to assess the value of the land, and continued the same, notwithstanding the tender of an undertaking on the part of the company not to enter on the land until the further order of the Court, and notwithstanding the time during which the company was authorized to take lands for the railway would have expired before the hearing of the cause (1). Where a railway company had agreed to purchase the land of a landowner, and had a clause to that effect inserted in their Act, whereupon he withdrew his opposition to the Act, and they afterwards applied to Parliament for an Act to enable them to abandon the branch which affected the land in question, and to repeal that clause; Lord Chancellor Chelmsford, affirming a decision of Vice-Chancellor Sir W. P. Wood, held, that the Court would not restrain the company from making the application (2); though the Lord Chancellor said that the Court had undoubted jurisdiction to restrain by injunction an application to Parliament, but that in some of the cases which had been cited it had been stated that there was some difficulty in conceiving a case in which such a course could be adopted (3).

39. Where a railway company had purchased compulsorily portions of the plaintiff's land for the purpose of a branch railway, but suffered their powers to expire without making it, and before the period of ten years, within which they were bound to dispose of superfluous lands, had expired, they promoted a bill for enabling

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peer that the incorporated company should pay a given sum before entering his land, in consideration of his withholding opposition to the bill.

Court refused to restrain a company from applying to Parliament to enable them to abandon a line which affected land they had agreed to purchase of landowner, and had had a clause to that effect inserted in their Act, and he thereupon withdrew his opposition.

(1) *Petre (Lord) v. Eastern Counties Railw. Co.*, 1 Railw. Cas. 462.

(*Earl of*) *v. Great Northern Railw. Co.*, 10 Hare, 665; *post*, p. 880, pl. 47.

(2) *Steele v. North Metropolitan Railw. Co.*, L. R. 2 Ch. 237; *v. Lindsey*

(3) *Ib.*

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The words "dispose of" in sect. 128 of 8 Vict. c. 18, refer to a transfer of land to some other person, not its application to a new purpose.

Abandonment of the undertaking for which lands are purchased, gives no right of reconveyance to original owner.

No right exists in landowner compelled to part with his land to oblige the company to complete their undertaking.

The right of pre-emption under sect. 128 does not arise before expiration of ten years, unless company about to sell, &c., the land.

The term "superfluous lands" in sects. 127, 128, means "more than are wanted for the undertaking."

It is not imperative on the Court to enforce a statutory prohibition.

them to make another branch railway, and proceeded to carry on works on the above portions of the plaintiff's land for the purposes of the proposed branch line; the Lord Chancellor, affirming the decision of Vice-Chancellor Sir W. P. Wood, held, on demurrer, that the plaintiff's right of re-purchase under the 128th section of the 8 Vict. c. 18, had not arisen, for that the words "dispose of" in that section refer to a transfer of the land to some other person, not to its application to a new purpose (1); and also, that the abandonment by the company of the undertaking for which the lands were purchased did not, independently of legislative enactments, give the plaintiff any right to a reconveyance; and that the plaintiff had no equity to restrain the company from any user of the land not shewn to be productive of irreparable injury to it; and that although a landowner has been compelled to part with his land to a railway company, however beneficial it may be to him that the railway should be made, no obligation is thrown on the company to complete their undertaking, and no right exists in the landowner to compel them to do so; nor, if the company should altogether abandon the undertaking, and apply the land taken under the powers of the Act to a different purpose than the making of the railway, has the landowner any new right, arising from the state of things, which can be enforced in a Court of Equity; and the landowner's right of pre-emption under the 128th section does not arise before the expiration of ten years, unless the company by some act of theirs have shewn that they are about to sell and dispose of the land. But the term "superfluous lands" in the 127th and 128th sections of the Act, preceded by the expression "the lands which shall not be required for the purposes thereof," means "more than are wanted for the undertaking," and is sufficient to include the case of an undertaking being abandoned (2).

means "more than are wanted for the undertaking."

40. It is not imperative on the Court to enforce by interlocutory injunction a statutory prohibition. And where a railway company was about to violate a clause in their Act, inserted at the instance

(1) *Astley v. Manchester, Sheffield, & J. 453; 4 Jur. (N. S.) 129; 27 and Lincolnshire Railw. Co., 2 De G. L. J. (Ch.) 299.*

(2) 1b.

of the plaintiffs, expressly prohibiting the opening of a main line until a junction line was opened; and in default of the defendants making the junction within a specified time the plaintiffs were authorized to make it; but the whole of this clause appeared to have been introduced merely for the purpose of obliging the company to complete speedily the junction line; the Court of Appeal, on an undertaking being given to complete the junction line with all practicable diligence, suspended an interlocutory injunction granted by the Master of the Rolls to restrain the opening of the main line before the completion of the junction line (1). And where a railway company was authorized by their special Act to construct a main line with a branch, and had nearly completed their main line, but had taken no steps towards commencing the branch; Vice-Chancellor Sir J. L. Knight Bruce held, upon an information, that the remedy for not commencing the branch, if any, was by mandamus; for if the public interests represented by the Attorney-General were entitled to have the second line of railway made, they should proceed by mandamus; and the Vice-Chancellor allowed a demurrer by the company for want of equity to an information at the relation of residents in the neighbourhood, praying a declaration that a railway company constituted for making a principal and a diverging line of railway was bound to construct the diverging line as well as the principal, and to open the whole for public traffic simultaneously, and for an injunction to prevent them from making one line until another was made, or until the notices to treat were given to the landowners preliminarily to making such other line; and although the injunction was asked at a period when a mandamus could not be obtained for five months (*i.e.*, till after the long vacation), yet the Court held, that this was not sufficient reason for granting the injunction, and gave no equity that could support the information (2). But the Vice-Chancellor said he desired to be particularly understood as not giving any opinion as to what it would have been right to do if the case made by the information had

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Main line not (here) restrained being opened until junction opened.

Injunction refused on information at relation of residents, to prevent completing main line until branch line made, or notices to treat given for branch line.

Sed quære as to the proper course, if the case had been made on bill by shareholder or landowner.

(1) *Cromford and High Peak Railw. Co. v. Stockport, Disley, and Whaley Bridge Railw. Co.*, 1 De G. & J. 326; 24 Beav. 74; 3 Jur. (N. S.) 628.

(2) *Att.-Gen. v. Birmingham and Oxford Junction Railw. Co.*, 4 De G. & Sm. 490; 3 Macn. & G. 453; 15 Jur. 1024; 16 Jur. 113.

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Railway company restrained evicting lessees—licensees of right to sell books, &c., at company's stations—from book-stalls, and notwithstanding lessees not strictly and honourably performing their part of agreement, it being impossible to obtain adequate relief at Law, or to estimate the damage.

been made on a bill by a shareholder or a landowner, or upon information and bill (1).

41. Where a railway company had granted to two lessees the sole and exclusive license and privilege for ten years of selling books and other publications at such of the company's stations as the lessees should think fit, and of using the book-stalls thereat respectively, and had covenanted that all books sent by the lessees to be sold, pursuant to such license, should be conveyed by the company's train to any such station without any charge, and had warranted quiet and peaceable enjoyment; Vice-Chancellor Sir W. P. Wood held, as to stations where book-stalls were in existence at the date of the grant, that the company must be taken to have granted the user of those specific stalls; and if not, still it was incumbent on the company to shew that stalls to which they attempted to remove the lessees would be equally convenient; and, secondly, as to other stations, that if the lessees could be entitled in any case to erect stalls thereat, the Court would make a declaration to that effect, because the Court could not judge whether sales from stalls, or by colportage, should be adopted, and also because such a declaration would lead to continual applications with reference to the gradual increase in size of the stalls; and, thirdly, that the privilege of selling books, &c., authorized a *bonâ fide* sale to passengers, and such other persons as ordinarily attended the company's station on business connected with railways, and not a general agency; consequently that the lessees were not entitled to free carriage except in respect of books to be so sold, and not all such books as H. and his agents might sell at the book-stalls to persons in the neighbourhood coming there without any reference to traffic, and that the company was not bound to erect book-stalls for H. at any stations where none existed at the date of the agreement, but that he was to be at liberty to sell at such stations by means of a tray, or some such contrivance. And upon a bill filed by the lessees, an injunction was granted, restraining the company from evicting them from book-stalls existing at the date of the agreement, notwithstanding they, the lessees, failed in their contention as to the second and third points,

(1) *Att.-Gen. v. Birmingham and Oxford Junction Railw. Co.*, 4 De G. & Sm. 490; 3 Macn. & G. 453; 15 Jur. 1024; 16 Jur. 113.

and notwithstanding misconduct on their part in not strictly and honourably performing their part of the agreement; the Court being of opinion that it would be impossible, under the circumstances, to obtain adequate relief at Law, or to estimate the damage to which they would be exposed if an injunction were not granted, and that the injury (*i.e.*, the shifting of the metropolitan bookstalls, where the principal bookstall was) would be irreparable (1). Where a plaintiff filed his bill praying a declaration that, by virtue of certain articles of agreement and a board minute, and under the circumstances, he was entitled to a lease of the refreshment rooms of the Great Western Railway Company for a term co-extensive with that for which a lease of an hotel was granted by the company, and that the defendants might be decreed to execute a proper lease accordingly, and also seeking to restrain the defendants from granting any lease of the refreshment rooms to any person other than the plaintiff, and from permitting any person other than the plaintiff to occupy and use such refreshment rooms; Vice-Chancellor Sir G. M. Giffard held, first, as to the refreshment rooms on one line, that no agreement of which the specific performance could be granted was proved; and that in any case the Court could not enforce specific performance of an agreement, as in this case, by a director with the company for the benefit of himself or his firm; and, secondly, as to the other, or upper line refreshment rooms, that the occupation was not determinable at the mere will of the company, and that the plaintiff was entitled to have the agreement carried into effect by having a deed executed to him as the assignee, with all proper provisions granting the right of occupation of the upper refreshment rooms to him, his assigns and nominees, being tenants under the lease of the hotel, subject to the provisions and restrictions contained in the agreement, the plaintiff not to be disturbed by proceedings at Law, or otherwise, until the deed was executed (2).

The Court will not enforce specific performance of an agreement by a director with a company for his own or his firm's benefit.

42. Where preference shares in a railway company had been issued under the provisions of an Act of Parliament authorizing

Court will restrain a declaration of divi-

(1) *Holmes v. Eastern Counties Railw. Co.*, L. R. 7 Eq. 116; 38 L. J. (Ch.) 117; 19 L. T. (N. S.) 345; *v. (N. S.)* 737.

(2) *Flanagan v. Great Western* 461.

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dend on ordi-
nary stock,
made without
regard to the
prior right of
preference
shareholders.

the company to guarantee the payment of dividends thereon at a fixed rate in preference to the payment thereof on the ordinary shares of the company, and the resolution for issuing them provided that they should bear “£5 per cent. interest, or preference dividend, in perpetuity;” and other preference shares had been issued under an Act of Parliament, providing that the holders should be entitled to dividends thereon at a given rate “in preference to the payment of dividends on the ordinary shares;” the Court of Appeal (Lord Chancellor Cranworth and the Lords Justices), upon a bill filed by the preference shareholders to obtain an injunction to restrain a declaration of a dividend on the ordinary stock without regard to the prior right of the preference shareholders, held (affirming the decision of Vice-Chancellor Sir W. P. Wood), that they were entitled to the injunction; and that if the profits at any period of distribution were insufficient to pay in full the dividends due to the preference shareholders, the arrears must be paid out of subsequent profits (1). And a subsequent Act of Parliament having directed the profits of a particular half year to be applied in replacing a loss sustained by the company, and directed the surplus, if any, to be applied, so far as it would extend, in paying the preference shareholders their dividends for that half year; the Court also held, that this Act did not take away their claim against the subsequent profits, and that the right given them by the latter direction was cumulative, and not substitutionary (2). Where by a railway company’s Act, after reciting that the company had issued certain “preference shares” on the terms of the holders thereof being entitled to “fixed preference dividends thereon, payable out of the revenues of the company,” at certain rates in the Act mentioned, it was enacted, that the income of the company from time to time applicable to the payment of interest on moneys borrowed and dividends on shares, should be applied, first, in payment of interest from time to time accruing on mortgages and bonds; next, in payment of the preferential dividends on the several classes of preference shares in the order in the Act.

(1) *Henry v. Great Northern Railw. Co.*, 1 De G. & J. 606; 4 K. & J. 1 (*vide* 26 & 27 Vict. c. 118, the Companies Clauses Act, 1863, ss. 13-15, as to the creation and issue of new preference shares or new preference stock).

(2) *Ib.*

specified; and, lastly, in payment rateably of dividends on original shares; and the contracts upon which the preference shares had been issued and taken up (irregular in themselves, but rendered valid by the Act,) were to the effect that such preference shares should be entitled, some to a dividend at a certain given rate per cent. for a given number of years, and at a lower given rate in perpetuity thereafter; others to a given rate per cent. without restriction as to time; and others at a given rate per cent. for a term certain, and thereafter until such time as they were redeemed by the company; upon a bill filed by some of the preference shareholders, on behalf of themselves and all others except the defendants, against the company, the directors and secretary of the company, and some of the ordinary shareholders, praying a declaration that the net balance at the end of each half year applicable to the payment of dividend on the capital stock ought to be applied, first, in payment of the dividend then accruing due, and the unpaid arrears of former dividends on the first preference shares; and then in payment of the accruing dividend and unpaid arrears of former dividends on the second, third, and fourth preference shares successively, according to their priorities, and before any dividend was paid to any of the ordinary shareholders; and for an account and payment on that footing; and an injunction to restrain the directors from dealing otherwise with the present or future balances; Vice-Chancellor Sir W. P. Wood held, that, coupling the enacting part of the Act with the recitals in its preamble, and having regard to the contracts upon which the shares were issued, the holders of such preference shares were entitled, according to their priorities *inter se*, to arrears of former dividends before any dividend could be paid to the holders of ordinary shares; and the Vice-Chancellor said that the word "dividend" does not refer exclusively to a share of any particular profits of a concern, and that he did not think that the word "dividend" had in itself, *ex vi termini*, any such meaning as to give the company the power of saying it should be merely a sum payable out of periodical divisions of the capital of the company, and that (here) the consequences of so restricting it would be to enable the holders of ordinary shares so to arrange the declaration of their dividends as to prevent the holders of preference shares from deriving any of

The word "dividend" does not refer exclusively to a share of any particular profits of a concern.

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the advantages for which they had stipulated (1). And a preferential shareholder may file a bill to restrain a company from making a dividend prejudicial to his interests without waiting till there are funds to make a dividend (2). Where a company, having a fund in their hands which they were entitled to treat as revenue, declared a dividend out of that fund in favour of the ordinary shareholders, and a bill was filed by one of the preferential shareholders to restrain the company from paying over that dividend without having regard to the right of the preferential shareholders to be paid arrears of dividend which had accrued on their shares, naming one of the ordinary shareholders, the defendant, to represent the class; and an objection was taken to the bill for want of parties, on the ground that by the declaration of the dividend each of the ordinary shareholders had acquired a separate and independent right to his share in that dividend, and ought, therefore, to be separately represented; the Court held, that the declaration of a dividend in favour of the ordinary shareholders did not prevent the general rule applying, that where a class of persons have a community of interest they may be sufficiently represented by an individual member of that class, and therefore that the suit was properly constituted (3).

The proprietors of a new road projected but not completed before the railway was authorized, not entitled (here) to an archway, &c.

43. Where, in 1850, a meeting of landowners had been held for the construction of a private road from A. to join a turnpike road at point C.; and in 1854 the road had been constructed as far as D., which was within 250 yards of the proposed point of junction, when the works were suspended, and the proprietors of the new road, however, entered upon the remaining land, cut down the trees, and marked out the proposed line of road; and in 1853 a railway company was projected and the plans deposited, shewing that at the proposed point of junction of the new road with the turnpike road, the turnpike road should be raised several feet, and the new road was not referred to in the deposited plans; and in 1854 the Act passed without making any provision in respect of it, and the new road was afterwards completed throughout, and opened

(1) *Crawford v. North-Eastern Railw. Co.*, 3 K. & J. 723; 3 Jur. (N. S.) 1039.

(2) *Sturge v. Eastern Union Railw.*

Co., 7 De G. M. & G. 158.

(3) *Smith v. Cork and Bandon Railw. Co.*, 3 Ir. Reps. Eq. 356.

for traffic in 1855; but from point D. to the point of junction with the turnpike road the gradient of the new road was very steep; and assuming the company to have constructed their line by raising the turnpike road, according to the deposited plans, the junction at point D. would have been impracticable; and the company subsequently constructed their line, but instead of raising the turnpike road, according to their deposited plans, they turned it, and interposed the railway between the turnpike road and the new road; upon a bill filed by the proprietors of the new road, the Master of the Rolls held, that the fact of the new road being projected and completed to within 250 yards of the proposed point of junction before the railway was authorized or planned, did not establish, in the proprietors of the new road, the right to join the turnpike road in the same way as they would have been entitled to if the company's Act had not passed; and that the proprietors of the new road were not entitled to have an archway formed under the railway, or to have the road united on either side, at the expense of the company (1). Whenever the Legislature has, by a special Act, conferred powers on a particular corporation or body of commissioners for the purpose of carrying out a particular object of public benefit, a general Act subsequently passed, giving to other persons, for another public purpose, inconsistent powers, in terms which from their generality would seem to override the powers given by the former Act, will not override those special powers. And where a railway company had been empowered by their special Act to widen a branch of their railway passing through London, and to build additional stations; and in conformity with the powers so given the company had proceeded to erect a station on their land by the side of a highway, within the distance required to be left between buildings and highways in London by the Metropolis Management Act, which had passed shortly after the special Act of the company; Vice-Chancellor Sir W. P. Wood held that the powers conferred on the company by their special Act were not controlled by the later statute, and that the company were authorized so to build their station. And in the same case where, by a statute passed prior to the Railway Act, the trust-

When the Legislature has vested special powers in a body for an object of public benefit, a subsequent general Act giving to others for a public purpose powers inconsistent with the special powers, will not override them; and company (here) not restrained erecting station in London contrary to the provisions of the Metropolis Management Act passed after the company's Act.

(1) *Gawthorn v. Stockport, Disley, and Whaley Bridge Railw. Co.*, 3 Jur.

(N. S.) 573.

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A note upon a section of a railway deposited with clerk of the peace, and referred to by the Act—that a particular road was to be stopped and another substituted, not notice to public and landowners, and injunction granted to restrain stopping until a proper substituted road made.

And the carrying the railway across the road on a level was held a violation of the injunction.

tees of the particular highway had power to prevent any building being erected so near to the road as the station was being built, and the Metropolis Management Act repealed this statute, and vested this authority in the managing body thereby constituted; the Vice-Chancellor held, that the trustees of the road must be taken to have been present at the passing of the Railway Act as well as of the Metropolis Act, and therefore the powers given by the Railway Act must prevail (1). Where, upon one of the sections of a railway deposited with the clerk of the peace, and referred to by an Act (afterwards passed) authorizing the formation of the line, there was a note to the effect that a particular road, therein delineated, was to be stopped up, and another, therein also delineated, was to be a substituted road for it; the Court held, that the public and the landowners were not thereby affected with notice, so as, upon the ground of acquiescence, to be precluded from obtaining an injunction, upwards of four years afterwards, on the company's proceeding to stop up the road (2). The works for stopping up the above mentioned road were commenced in October, 1849, although it was not rendered entirely impassable till February, 1850, but the Court held, that an application for an injunction in February, 1850, was not too late (3). And the provisions of the Railways Clauses Consolidation Act, 1845, requiring a substituted road to be made in certain cases, were held not to be satisfied by an existing road, which was alleged to be as convenient as any new substituted road could be (4). The bill, in this case, stated that a railway company was interfering with a public road by digging a trench and lowering the level of it, and causing a permanent and complete obstruction, and prayed for an injunction restraining the company from obstructing the road or rendering the same less convenient for the passage of carriages, &c., than it had previously been, until they had made a proper substituted road; and an injunction to that effect was granted. The company then changed their plan, and instead of lowering the road, carried the railway across it on a level, with posts and gates, which were

(1) *London and Blackwall Railw. Co. v. Limehouse District Board of Works*, 3 K. & J. 123; 26 L. J. (Ch.) 164.

(2) *Att.-Gen. v. Great Northern Railw. Co.*, 4 De G. & Sm. 75; 14 Jur. 684; 15 Jur. 387.

(3) *Ib.*

(4) *Ib.*

closed only during a few short and ascertained periods in the day when trains crossed; but the Court held, that the general terms of the injunction were not restricted by reference to the particular nature of the injury complained of, but that it had in spirit as well as terms been violated, and a sequestration was ordered to issue for the contempt, and was only stayed upon appeal, upon the defendants paying all the costs, and undertaking to construct a road in conformity with the provisions of the Railways Clauses Consolidation Act, and in the meantime to provide and maintain a free passage at all times; and though the injunction was granted in May, and the sequestration was directed to issue in November for a breach of it, the Court refused to suspend the latter order pending an appeal from both orders, although the result of the sequestration would be to compel the defendants to construct a bridge (which would become unnecessary if the order should be reversed) and to stop the traffic on the line in the meantime (1).

Where a railway company having begun to divert a turnpike road by a crossing on a bridge over their railway, with a sharp curve, and an information at the relation of two of the trustees of the road was filed, praying for an injunction to restrain the company from crossing, breaking up, cutting through, or in any way interfering with the road until they should have provided another road over the proposed railway as convenient for passengers and carriages as the then present road, or as near thereto as circumstances allowed (as required by the Railways Clauses Consolidation Act, 1845, s. 56); the Vice-Chancellor, Sir J. L. Knight Bruce, holding that the company were not doing as little damage as could be, and that the road was not "as convenient" as the former, or as near thereto as circumstances would allow, granted the injunction, but without prejudice to any application either party might make to the railway commissioners, in whom the powers of the Board of Trade for these purposes were, under the 66th section of the above Act, vested. In granting such an injunction the Court cannot point out to the company what they ought to do, except by stating the reasons which induce the Court to come to its conclusion, or the manner in which it appears to the Court that that which seems

The Court restrained the diverting a turnpike road by crossing on a bridge over the railway with a sharp curve, the road not being "as convenient," &c., within sect. 56 of the Railways Clauses Consolidation Act.

(1) *Att.-Gen. v. Great Northern Railw. Co.*, 4 De G. & Sm. 75; 14 Jur. 684; 15 Jur. 387.

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an evil can be remedied (1). Where an agreement was entered into between a landowner and a railway company that the former should not oppose a projected railway, on condition that there should be a reference to arbitration for, among other purposes, defining the line of approach to his premises from a turnpike road which it was proposed to divert; and after the award indicating such approach had been made, it became expedient for the company further to divert the turnpike road, but within the limits of deviation, and, consequently, necessary to alter the line of the approach to the landowner's premises; Lord Chancellor Cottenham held, reversing a decision of Vice-Chancellor Sir J. L. Knight Bruce, who had granted an injunction, that the company were not precluded from making such alteration. The Lord Chancellor said, that he was of opinion that there was a performance, not only in spirit, but according to the letter of the award; and that if the substituted road was not so convenient a mode of communicating with the plaintiff's premises into the town as the one awarded, that was an injury not provided for by the contract, but was a case which expressly came under the 16th section of the Railways Clauses Consolidation Act, whereby all damage to roads, &c., was the subject of compensation, and he dissolved the injunction (2). An agreement to withdraw or withhold opposition to a bill in Parliament is not illegal; and a Court of Equity will enforce a contract founded on such a consideration; and, therefore, where M., a person acting on behalf of the projectors of a railway who were then soliciting a bill in Parliament for the purpose of forming themselves into an incorporated joint stock company, entered into a contract with the trustees of a road, whereby it was stipulated that in consideration of the trustees withdrawing their opposition in Parliament, and consenting to forego certain clauses which they intended to press for insertion in the Act, a formal instrument to the effect of the clauses should be executed under the seal of the company when incorporated; and the bill was accordingly allowed to pass unopposed and without the clauses; an injunction was granted at the suit of the trustees to prevent the company

The Court will enforce a contract founded on an agreement to withdraw opposition to a bill, and will restrain a company from violating provisions omitted from bill, but agreed with trustees of a road to be executed after incorporation.

(1) *Att.-Gen. v. London and South-Western Railw. Co.*, 3 De G. & Sm. 429.

(2) *Wood v. North Staffordshire Railw. Co.*, 1 Mac. & G. 278; 1 H. & T. 611; 13 Jur. 466.

from violating the provisions contained in the omitted clause. Lord Chancellor Cottenham said that it could not be denied, however, that the act of M. was the act of the projectors of the railway; it was therefore the agreement of the parties who were seeking an Act of incorporation that, when incorporated, certain things should be done by them. But the question was, not whether there were any binding contract at Law, but whether this Court would permit the company to use their powers under the Act in direct opposition to the arrangement made with the trustees prior to the Act upon the faith of which they were permitted to obtain such powers. If the company and the projectors could not be identified, still it was clear that the company had succeeded to, and were then in possession of, all that the projectors had before; they were entitled to all their rights, and subject to all their liabilities. And that if any one had individually projected such a scheme, and in prosecution of it had entered into arrangements, and then had sold and assigned all his interest in it to another, there would be no legal obligation between those who had dealt with the original projector and such purchaser; but that in this Court it would be otherwise. So here, as the company stood in the place of the projectors, they could not repudiate arrangements into which such projectors had entered; they could not exercise the powers given by Parliament to such projectors in their corporate capacity, and at the same time refuse to comply with those terms upon the faith of which all opposition to their obtaining such powers was withheld (1). Where a railway company, about to sever the plaintiff's land by their railroad, agreed to purchase the necessary portion of land, "subject to the making such roads, ways, and slips for cattle as might be necessary;" upon a bill for specific performance and an injunction, the Master of the Rolls, Lord Langdale, held, that although it was very difficult to execute an agreement thus expressed, yet that the plaintiff was entitled to a specific performance; that the word "necessary" must receive a reasonable interpretation, and the expression was held to mean "such roads, ways, and slips for cattle as might be necessary and proper for convenient communication between the severed portion of the plaintiff's

(1) *Edwards v. Grand Junction Railw. Co.*, 1 My. & Cr. 650; 7 Sim. 337;
6 L. J. (N. S.) Ch.47.

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land;" and a reference was therefore directed to ascertain what was necessary and proper (1). Where the plaintiff was a lessee, for a term of twenty-one years, of prebendal lands, there being reserved to the lessors the woods, underwoods, mines, quarries, and seams of clay, with full and free authority and power to enter and cut down, and to dig, win, work, get, and carry away the same, with free ingress, egress, way-leave, and passage to and from the same, or to or from any other mines, quarries, and seams of clay, on foot and on horseback, and with carts and all manner of carriages, and also all necessary and convenient ways, passages, conveniences, privileges, and powers whatsoever for the purposes aforesaid, and particularly of laying, making, and granting waggonways in and over the demised premises, paying reasonable damages; the Vice-Chancellor, inclining to the opinion that the reservation did not enable the lessors to grant to a public company a license to make a railway for the purpose of conveying passengers and general merchandise, but was only intended to enable the lessors or their grantees to convey mineral produce and wood from the demised lands to and from adjacent lands, granted an injunction restraining the lessors and their licensees from proceeding to make a railway for the former purpose, previous to the precise extent of the reservation being ascertained by the decision of a Court of Law (2). Upon a motion for an injunction to restrain a railway company from stopping up a road until they should have made another as convenient as the old road, according to the Act of Parliament; the Court held, that it did not appear to be the intention of the defendants to break up the old road until a new one (about to be formed), was completed, and that the injunction could not be granted, but that the motion should stand over till it was ascertained whether the company would, after making the new road, proceed in an illegal course, and whether the new road was really as inconvenient and contrary to the clauses of the Act as the plaintiff alleged (3). Where the plaintiff, having a right to use a road, the defendants (a railway company) had contracted for

Company
restrained
using a road

(1) *Sanderson v. Cockermouth and Workington Railw. Co.*, 11 Beav. 497;

2 H. & T. 327.

(2) *Farrow v. Vansittart*, 1 Railw. 403.

Cas. 602.

(3) *Kemp v. London and Brighton Railw. Co.*, 1 Railw. Cas. 495; 3 Jur.

20,000 cubic yards of clay; and on the 2nd of March fifty loads of it were brought by the contractor, for the purpose of being removed into the defendants' premises, and were placed in the road opposite the plaintiff's gates, so as to obstruct the entrance, and all further carting into the road was stopped, upon the plaintiff's application to the defendants; but the clay was left on the road until the 9th, when its removal was commenced—and finished on the 13th, and on the 10th the plaintiff filed his bill, and on the 12th obtained an *ex parte* injunction to prevent the injury complained of, having, prior to the 10th, employed a person to remonstrate with the defendants, which caused the removal, although the plaintiff was not aware that the removal was intended when he filed his bill; the Vice-Chancellor held, first, that the contractor was the agent of the defendants, and that therefore they were liable for his acts; secondly, that the use of the road by the defendants was unreasonable; and, thirdly, that the subsequent removal was no ground for dissolving the injunction, unless it could be shewn that the plaintiff was guilty of misrepresentation or concealment as to the probable continuance of the evil when he filed his bill; and ignorance of what the plaintiff ought to have known is not sufficient ground for dissolving the injunction (1). The preamble of the London and Brighton Act, after reciting that a railway between London and Brighton would be of great public advantage, by sect. 3 enacts that it shall be lawful for the company to make and maintain a main line of railway and branches, with all proper warehouses, wharves, and all other suitable and proper works, communications, &c.; and by the 12th section the usual powers are conferred on the company for making and maintaining the railway; and, among others, to make and construct, upon, across, or over, any roads, &c., such roads, ways, cuttings, &c., as the company shall think proper. The company having purchased a private wharf, separated from one of their terminus stations by a turnpike road, laid down on the road, stone

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by placing loads of clay on it, so as to obstruct entrance to plaintiff's gates—such use of the road is unreasonable.

The Court refused (here) to restrain trustees of a road from removing stone blocks laid down in a road lying between a terminus station and a wharf purchased by the company.

(1) *Semple v. London and Birmingham Railw. Co.*, 1 Railw. Cas. 430; 2 Jur. 560; see S. C. 1 Railw. Cas. 120, where the Lord Chancellor, reversing the decision of the Vice-Chancellor,

refused an injunction because the plaintiff had not established his right at Law, the affidavits being conflicting on the question of nuisance.

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The Court refused to restrain a company partially diverting a stream of water, and from also occasioning by the works the obstruction of a private road — plaintiffs being held to have had notice and having acquiesced for eighteen months.

The Court will oblige a railway company to comply with their Act prescribing the mode in which a turnpike road, to be crossed by a railway, is to be constructed.

blocks, so as to form two runs or stoneways level with the road, for the purpose of facilitating the passage of goods from the wharf across the road to the station; but the Court held, that the company were not authorized by their Act to interfere with the road in such a manner, and an injunction which had been granted to restrain the trustees of the road from removing the stone blocks was dissolved, although, in the opinion of the Court, no damage could result from the stone blocks, either to the road or the passengers upon it (1). Where a railway company made excavations upon their own land, the purpose of which was the partial diversion of the stream of water of a navigable river (the Calder); and the works so prosecuted necessarily occasioned the obstruction of a private road; and the plaintiffs, who were the owners of a fulling mill which was supplied with water from the river, alleged that the proposed diversion of the stream was illegal under the powers of the Act; and the plaintiffs, who had a right of way over the private road, also alleged that the company were interfering with the road without the performance of the conditions imposed by the Railway Act as preliminary to interfering with the road; the Court held, that although the company were working on their own land, the plaintiffs must be held to have had notice of the intended works of the company; and had, by an acquiescence for eighteen months, during which the company had expended a large sum of money on the works, precluded themselves from asking for the interposition of this Court by injunction; and, *semble*, the plaintiffs, although interested by the situation of their property, or the nature of their business, in preserving open the navigation of the river, but not otherwise interested in the navigation, were not entitled to sustain a suit to enforce clauses in the Railway Acts protecting the Calder navigation from injury by the railway works (2). Where the 70th and 71st sections of a Railway Act provided for the crossing by a railway of roads, not being turnpike roads; and the 72nd section provided that a turnpike road which should be crossed by the railway should be raised or sunk so as to pass over or under the railway; and it being proposed that the railway should cross the N. Bridge Road in the mode provided for by the 70th and 71st

(1) *London and Brighton Railw. Co. v. Cooper*, 2 Railw. Cas. 312.

(2) *Ilkington v. Manchester and Leeds Railw. Co.*, 2 Railw. Cas. 187.

sections, and the plaintiffs, the proprietors of the road, having filed their bill, insisting that the road was a turnpike road, and praying to restrain the company from crossing over or using the same until they should have complied with the 72nd section; on a motion for an injunction, the Court, being of opinion that the road was not a turnpike road, and therefore not within the 72nd section, refused the motion, but gave leave to the plaintiffs to take the opinion of a Court of Law upon the question, as being one of legal construction; and a case was accordingly made for the opinion of the Court of Exchequer, and a certificate returned by the judges of that Court stating that the N. Bridge Road was a turnpike road. The Court, on an application by the railway company, refused to send the legal question for the opinion of another Court of Law; and, upon a motion for the injunction as consequent upon the above certificate, held, that as the object of the plaintiffs must be to procure for the public using the road a compliance with the 72nd section of the Railway Act, upon the railway company entering into an undertaking to proceed with and complete a bridge over the road with all possible dispatch, an injunction ought not to be granted during the time which must necessarily elapse in building the bridge (1). Where by a clause in an Act of Parliament it was enacted, "that nothing herein contained shall be construed to prevent any owner or occupier of any ground through which the said railway may pass from carrying at his or their own expense any railway or other road, or any cut or canal which such owner or occupier is authorized to make in his or her lands or grounds across the said main railway, within the respective lands or grounds of such owner or occupier;" the Court held, that the right given by this clause was not confined to the state of the land at the time the Act passed, but was intended for the convenience of the occupiers from time to time of the land partly on one side, and partly on the other, of the principal railway, and that, without reference to the title under which it was held (2). And, *semble*, no interdict will be granted to prevent a party having the right to cross a railway from prolonging and extending it for the use of

The right given (here) by a clause of the Act, to owners, &c., of land to carry any railway, &c., across the main railway, was held as intended for the convenience of the occupiers from time to time, and not confined to the state of the land at time of passing the Act.

(1) *Proprietors of the Northam Railw. Co.*, 1 Railw. Cas. 653; see *Bridge and Roads v. Southampton* S. C. at Law, 6 M. & W. 428.

(2) *Monkland v. Kirkintilloch Railw. Co.*, 3 Railw. Cas. 273.

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Surveyors of roads are not justified in putting up fences across a temporary diverted road, so as to obstruct passage of locomotive engines; they should apply for an injunction or a mandamus.

any persons with whom he might make an agreement for that purpose (1). In *London and Brighton Railway Company v. Blake* (2), the Court held, that the surveyors of roads for the parish of C. who had put up fences on either side of a temporary diverted road, so as to obstruct the passage across it of locomotive engines; even if they had, under the 59th and 60th sections of the Companies Act, a jurisdiction to determine in what manner a diverted permanent road should be made (which they had refused to accept or approve), they were not justified in putting up the fences across the temporary road, but ought to have applied to this Court for an injunction, or to a Court of Law for a mandamus; and that the right of the surveyors was a private right; and that they were in no way interested in the question of public safety.

44. Where an iron company, the owners of a railway, being desirous of making, on the principle of "way-leave," a branch line for the purpose of connecting their railway with other railways, had applied to the various landowners, among whom was J. C. O., for the necessary way-leaves, and had received a proposal from the landowners, that as they were desirous of obtaining Stanhope lime for agricultural purposes, and as they believed the railway would be of great advantage to the district, &c., they offered the iron company way-leaves over their properties on lease for sixty years, by the payment of triple damages yearly, and this proposal was signed by J. C. O., and accepted by the iron company, who thereupon entered into an agreement with the plaintiffs, the directors of another railway company, who were to make the line; and possession of the land was taken by the railway company in pursuance of the offer, and the railway made, at a great expense, with the knowledge of the landowners, who made no objection thereto; Vice-Chancellor Sir J. Stuart held, that there had been a variation in the parties and in the subject matter of the offer, by changing a railway made for mineral traffic into a railway for general public conveyance, and also, that on the construction of the instrument signed by J. C. O. there was not such an acceptance of that offer as to constitute an agreement which could bind the landowners to grant a lease at a rent on the principle of triple damages (3). And

(1) *Monkland and Kirkintilloch Railw. Co.*, 3 Railw. Cas. 273.

(2) 2 Railw. Cas. 322.

(3) *Meynell v. Surtees*, 1 Jur. (N. S.) 80.

though where, on the footing of an offer, possession of land has been taken, which is undisturbed by the landowner until after an expenditure on the faith of such offer, the Court, on the principle of contract, will protect possession, and strain its discretionary jurisdiction of specific performance so far as to fix the amount of a rent not expressly or further fixed by the terms of the offer than by an indication of the terms and principle on which the amount of rent is to be ascertained; yet where the plaintiffs, since filing their original bill, have obtained from the Legislature the means for protecting their possession, the necessity for straining the doctrine of specific performance is at an end, and the Court must have something very strong in a case where specific performance is sought as ancillary to getting possession, to induce it to strain its jurisdiction and fix the terms of an agreement not finally arranged; and where specific performance of an agreement for the grant of a lease is sought, there must be clear evidence of an agreement sufficiently certain in its terms (1).

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Where possession of land has been taken on the footing of an offer, and possession is undisturbed until after expenditure on faith of the offer, the Court will protect possession; but if means are obtained from the Legislature to protect possession, the necessity of straining the doctrine of specific performance is

(unless in exceptional cases) at an end. Where grant of lease sought there must be clear evidence of an agreement sufficiently certain in terms.

45. The 7th section of the Railways Clauses Consolidation Act, providing a mode of correcting "any omission, misstatement, or erroneous description of any lands described on the plans or books of reference," is intended to meet the case of any omission of land in the plan, or of description of any owner of it in the book of reference, or the omission of the number, or the misstatement of the acreage, or a mistake in the names of the owners, &c., as from an error in copying, or the like. The Vice-Chancellor, Sir W. P. Wood, said that the Legislature seemed to him to have meant no more than this, that where there should be such an erroneous description that the company could not act on their general empowering clauses, because they could not satisfy persons that the land in question was described in the plan and in the book of reference, they might then go before a magistrate to get that state of things corrected; and, therefore, where a mistake of omitting entirely the names of the intermediate lessees had occurred, and the intermediate lessees had not been made aware of the intention to take their land until a notice to treat was given them after the company had obtained their special Act; and such special Act incorporated the Lands

The 7th section of Railways Clauses Consolidation Act for correcting "omissions, &c., in plans, &c., is intended to meet omission, &c., of land, &c., and not to the case of omitting names of intermediate lessees.

(1) *Meynell v. Surtees*, 1 Jur. (N.S.) 80.

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Clauses and Railways Clauses Acts; and, after reciting that plans and sections had been made and deposited, enacted that the line should be made upon the lands delineated in the plan and described in the book of reference, Vice-Chancellor Sir W. P. Wood held, that the description there referred to was not meant to be a description entirely accurate in all respects, and therefore that the inaccuracy which had occurred did not disentitle the company to take the land under their compulsory powers (1).

The Court will enforce the 115th section of Railways Clauses Consolidation Act, that no engine, &c., shall be brought, &c., on railway, unless approved by company as therein mentioned.

46. The Court will enforce, by injunction, the provisions of the 115th section of the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), that no engine or other description of moving power shall be brought or used upon a railway unless the same shall have been approved by the railway company as therein mentioned, notwithstanding the practice of railway companies has been to rely on each other with respect to the fitness of their respective engines and not to enforce the provision of the Act; and notwithstanding also, that to enforce such right of inspection would occasion great inconvenience and danger to the public traffic. The Vice-Chancellor said, that the plain answer to this was, that the Legislature had given those rights, and that he had nothing to do but to enforce the rights which existed (2).

An agreement by a peer of Parliament in consideration of withdrawing opposition to bill, and endeavouring to prevent bill of rival company passing, is legal, and an agreement (here) *inter alia*, that all trains of company should stop at a certain station, was enforced against a com-

47. Where a landowner, being a peer of Parliament, had entered into an agreement with the projectors of a railway, stipulating, among other things, that they should take certain portions of his land, and pay him certain specified sums for the same, and by way of compensation for permanent injury to his mansion and estate that they should execute certain works of utility and ornament on his property, and make and maintain a station adjoining or near to a particular road, at which all trains passing along the railway should stop for the accommodation of passengers, and for the receiving and unloading of goods, luggage, carriages, and horses, with a provision that the landowner should withdraw his opposition to the bill of the projectors and co-operate with them, and use his best endeavours to prevent the bill of a rival company from passing

(1) *Kemp v. West End of London and Crystal Palace Railw. Co.*, 1 Kay & J. 681; 1 Jur. (N. S.) 1012.

(2) *Midland Railw. Co. v. Ambergate, Nottingham, and Boston and Eastern Junction Railw. Co.*, 10 Hare, 359.

into law ; but that if the bill of the rival company should pass, then that the first mentioned company should pay the plaintiff certain sums for the land the rival company might take, and recover from the latter and pay to the first mentioned company the largest amount of price and compensation which could be obtained, and a provision that either of the parties might determine the agreement by notice to the other, if the bill of the first mentioned company should not pass within six months ; and a further provision that if the two projected companies should be amalgamated, the amalgamated company should pay certain sums to the plaintiff as purchase money and compensation, and that the covenants and agreements concerning the purchase and taking of land, not making deviations without the plaintiff's consent, and the making and maintaining such station, and all other the covenants and agreements thereinbefore contained on the part of the first mentioned company, so far as the same should be applicable, should be performed by the amalgamated companies ; and by an Act passed within six months, the subscribers to the two projected companies were incorporated in one body, and authorized to make certain of the projected lines of railway ; and it was enacted that the shareholders of each company should be entitled in certain rates or proportions to the shares of the united company ; and it was held by the House of Lords, affirming the judgment of the Exchequer Chamber (which reversed that of the Court of Exchequer), that notwithstanding the bill of the first mentioned company did not pass, the agreement could not be determined by a notice given by the projectors, who were parties to the agreement, or by the amalgamated body ; and the amalgamated company having then taken the land referred to in the agreement, and paid for it the price thereby stipulated, and having, in a suit in Equity brought against them by the landowner, claimed the benefit of the agreement, and he then filed his bill for a specific performance of his contract with the projectors of the first mentioned company, and moved for an injunction to restrain the incorporated company from permitting any of their trains to pass a certain station near the road mentioned in the agreement without stopping thereat for the accommodation of passengers, &c. ; the Court held, that the union and incorporation of the shareholders of the two companies in one body, and the

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pany formed
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ting the two
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A corporation entering upon and taking possession of land mentioned in an agreement by a party acting as agent prior to its corporate existence, and otherwise availing itself of the contract, notwithstanding it is not under seal, is bound by the contract, and the Court will enforce it negatively and positively.

consolidation of their several shares under the Act of Parliament, constituted an amalgamation within the meaning of the agreement; that the amalgamated company was bound by the agreement entered into with the plaintiff by the projectors of the first mentioned company, and that there was no objection to the agreement in point of legality with reference to the position of the plaintiff as a member of the Legislature; and that, especially after the agreement had been the subject of consideration and construction in the House of Lords, and in the Court of Queen's Bench, this Court would not refuse to enforce it on any suggestion of illegality; and that the plaintiff was therefore entitled to the injunction, and, under the circumstances of the case, upon the interlocutory application before the hearing of the cause (1); and that the amalgamated company's Act having been passed without opposition by the plaintiff, which might reasonably be supposed to be in consequence of the agreement, acts done by the company under their Act were to be looked at as if done under the agreement; and without deciding whether a corporation can be bound by the acts of an agent not appointed under seal, the corporation in this case was held bound at all events, as they had entered upon and taken possession of the land mentioned in the agreement, and otherwise asserted its validity; and the decision in the case of *Edwards v. Grand Junction Railway Company* (2) did not proceed on the principle that the incorporated company was bound by the contract of a party acting as an agent for them prior to their corporate existence, but on the principle that the Court would not allow them to exercise powers acquired by means of such contract without carrying it into full effect, and in the absence of any adoption of the contract of such a party by the incorporated company, or of any attempt to exercise the powers thereby acquired, or of any part performance of such a contract against the incorporated company; but if they adopt or avail themselves of the contract, or exercise the powers acquired by its means, the Court will, in that case, not only negatively, but positively interpose,

(1) *Lindsey (Earl of) v. Great Northern Railw. Co.*, 10 Hare, 664, 679; 17 Jur. 522; 22 L. J. (Ch.) 995; *v. Simpson v. Lord Howden*, 1 Railw. Cas. 326, 338, 347; 1 Keen, 583; *Petre (Lord) v. Eastern Counties Railw. Co.*, 1 Railw. Cas. 462; *ante*, p. 861.
(2) 1 My & Cr. 650.

and compel the performance by them of every portion of the contract (1).

48. Where a railway company, having constructed a tunnel, had proceeded to dispose of the ground under which the tunnel ran, and had contracted on the 5th of June to sell a portion to B. subject to the condition that he was to erect no buildings, nor make any excavations, &c., but according to a specification approved in writing by the principal engineer, and B. had entered immediately, and sent in plans in August to the resident engineer for the approval of the principal engineer, and the resident engineer never submitted them to the principal, but told B. verbally that he might proceed, and B. thereupon proceeded till the 26th October, when the conveyance was completed; and the company's solicitor, finding him carrying on building operations, asked if he had the approval in writing of the principal engineer, and told him he must procure it, and the principal engineer then for the first time saw the plans of the proposed buildings, and immediately condemned them as dangerous to the tunnel, and, therefore, of course also dangerous to the proposed houses; and B. insisting on proceeding, the company caused an information to be filed to restrain him, on the ground of danger to the public, and a counter information was thereupon filed against the company to restrain them from running their trains, on the same ground of danger to the public; and the fact of danger to the public by the continuation of B.'s plans was fully made out, and an injunction had been obtained on the first information, and refused on the second; Vice-Chancellor, Sir W. P. Wood, held, at the hearing, first, that the approval of the company's resident engineer was not binding on the company; and, secondly, that the defendant B. having been allowed to continue his works from August to the 26th October, was, under the circumstances, not such an acquiescence on the part of the company as to exempt B. from being restrained from further prosecuting his building (2).

49. Where a broad gauge railway company were shareholders in a mixed gauge railway company, who, by their Act, were bound to construct their line throughout on the broad gauge, and as

(1) *Lindsey (Earl of) v. Great Northern Railw. Co.*, 10 Hare 664, 679. (2) *Att.-Gen. v. Briggs*, 1 Jur. (N. S.) 1084.

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to part on the narrow gauge also; and in March, 1852, they filed a bill, stating that the mixed gauge railway company were about to construct the line throughout on the narrow gauge, although their funds were insufficient to enable them to do so, and also to comply with their Act as to laying down the broad gauge; and the bill sought an injunction to restrain the opening of any part of the narrow gauge line, and the further construction upon that gauge, until the broad gauge was complete; and in April, 1852, the injunction was refused, and from that time contests were carried on in Parliament between the two companies, ending in the rejection of certain bills solicited by the mixed gauge company; and from August, 1852, to January, 1853, a correspondence was carried on between them as to traffic arrangements; and in January, 1853, the broad gauge company filed a new bill, and sought an injunction to restrain the opening by the mixed gauge railway of any portion of the line upon the narrow gauge before the broad gauge was completed, and in the same month they moved for an injunction in the new suit, and also appealed from the refusal of the injunction in April, 1852; the Lords Justices, upon the grounds of delay, acquiescence, and of lying by and permitting a large expenditure to be made, and of comparative mischief, held that both motions were too late (1).

50. Where a railway company having powers within a fixed time to complete a branch line, had commenced, but afterwards, by a vote of the proprietary, suspended for a time the works, and before their powers expired, the works, on a resolution of the shareholders, had been resumed, and actively prosecuted, and after the lapse of nearly a year, the powers having then expired, and the branch railway still being unfinished, two shareholders, on behalf of themselves and the other shareholders, filed a bill to restrain the application of the funds in the further prosecution of the works of the branch line; on an interlocutory motion for an injunction, Vice-Chancellor Sir J. Stuart held, that the plaintiffs having been aware of the intention to construct the line, and not having applied with diligence, the Court would not grant the injunction (2). And, *semble*, the mere expiration

The Court refused to restrain prosecution of works (a branch line) although the powers had expired, there having been notice and acquiescence.

(1) *Great Western Railw. Co. v. De G. & Sm.* 437; 16 Jur. 443.

Oxford, Worcester, and Wolverhampton Railw. Co., 3 De G. M. & G. 341; 5

(2) *Ffooks v. South-Western Railw. Co.*, 1 Sm. & Giff. 142; 17 Jur. 365.

of the parliamentary period for the completion of a railway begun before the powers expired, is not enough to stamp with illegality the proceeding to complete such railway; and the injunction was refused also on the grounds that one of the plaintiffs named had acquiesced in the acts complained of; that the injunction would cause considerable inconvenience; that as all the land had been purchased it was not clear that it was illegal to complete the line; and that the suit was not properly framed, being on behalf of all the shareholders, which would include those who had sanctioned the acts sought to be restrained (1). And in this case a shareholder who had acquiesced in the recommencement of the works, having afterwards sold his shares to a purchaser, who objected to the further prosecution of the works, it was held, that the purchaser was bound by the acquiescence of his vendor (2). And, *semble*, where it is established that, on pretence of serving the interests of one company, a member of a rival company procures shares in order to oppose the company in which he has intruded, the Court, at the instance of such shareholder, will not ordinarily interfere (3). Where, by three Acts of Parliament of the same session, a railway company was empowered to make three distinct lines not joining with each other at any point, and forming a cluster and not a continuous line; and in the next session an Act was passed declaring the company to have lines, and to be only one company, and authorizing and requiring them to grant a lease of the lines to another company; and they completed only one of the lines, which was worked by the other company under the provisions of the last Act; and some months after it was obvious that the other two lines could not be completed within the time prescribed by the Acts; and a shareholder in the company filed a bill, seeking to restrain it from making calls, and applying its funds otherwise than for the purpose of constructing all three of the lines, but he did not make the company who were lessees parties to the suit; the Lords Justices held, that more inconvenience would arise from the Court interfering than from its abstaining to do so; and on this account, as well as on the grounds of acquiescence and want of parties, namely the company, lessees, an injunction granted by the Court

And a purchaser from an acquiescing shareholder is also bound.

(1) *Efooks v. South Western Railw. Co.*, 1 Sm. & G. 142; 17 Jur. 365.

(2) *Ib.*

(3) *Ib.*

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below was dissolved (1); and, *quære*, whether several railways, forming a cluster, differ from a continuous line with respect to the question of granting an injunction against the constructing of part only of an undertaking authorized by the Legislature (2).

51. Where a railway was constructed on a deviation beyond the authorized limits, but it had been decided that such deviation was proper, having regard to the interests of P., a landowner, Vice-Chancellor Sir R. T. Kindersley held, that P. was not entitled to the costs of moving for an injunction to restrain the railway company from so constructing the railway (3).

52. Where, by an Act of Parliament, with which the Lands Clauses Consolidation Act was incorporated, it was enacted that the powers of taking land compulsorily for the purpose of making a certain railway should not be exercised after the expiration of three years from the period of the passing of the Act, and the company gave notice to a landowner of their intention to take a part of his land, but took no other step till three days before the expiration of their compulsory powers, when they delivered a bond, and proceeded to take possession under the 85th section of the Lands Clauses Consolidation Act; and the landowner thereupon filed his bill, praying an injunction to restrain the company from proceeding further with the purchase, on the ground that their compulsory powers had ceased; the Court granted an interim injunction, but directed a case for the opinion of the Court of Exchequer (4). And where the time within which a railway company were authorized to take lands expired on the 4th of August, 1848, and long before this period they gave notice to a landowner to treat, and afterwards delivered to the plaintiff, to whom the lands had been in the meantime devised, a bond, and paid the estimated value of the lands comprised in the notice into the bank, under the Lands Clauses Consolidation Act, 1845, s. 80, and under an Amendment Act, the powers of which extended beyond 1848, the company were authorized to take the lands included in the notice; and on the 3rd of August, 1848, they gave a notice to the plaintiff that

(1) *Hodgson v. Powis (Earl)*, 1 De 1 Drew. 244; 17 Jur. 660.
G. M. & G. 6; 12 Beav. 392, 529.

(2) *Ib.*

(3) *Pearce v. Wycombe Railw. Co.*,

(4) *Kinnersly v. North Staffordshire Railw. Co.*, 6 Railw. Cas. 662.

in pursuance of the powers of both those Acts they intended to take the lands; and after the 4th of August, 1848, but without taking any further steps under the Acts, the company entered upon the lands; on a motion for an injunction, Vice-Chancellor Sir J. L. Knight Bruce declined to interfere, on an interlocutory motion for an injunction, on the grounds, among the other facts of the case, of the deposit of the money and the bond, and that if the Acts of the company had been insufficient to acquire for them a title or right to the lands, they would be able, by some proceeding under the second Act, to obtain it; and the motion was ordered to stand over, with liberty to the plaintiff to bring an action (1).

53. The arbitrary and despotic powers given by the Legislature to public companies are granted in consideration of an expected public benefit, and such companies must therefore keep within the limits of their powers; and where by Act of Parliament, railway A. was authorized to transfer a portion of the line to a railway B., with power for railway B. to raise new shares to complete it; and it was provided that if after the transfer the transferred line should not be completed within three years, it should not be lawful for railway B. to pay any dividend until the whole railway should be opened, and the three years had expired; the Master of the Rolls, Lord Langdale, held, that railway B. could pay no further dividends, even to its original shareholders, until the branch had been completed, and they were restrained by injunction in a suit by one shareholder, suing on behalf of himself and all others the shareholders except the defendants, and the company, and directors; and the Master of the Rolls restrained the payment of a dividend declared the day on which the bill was filed. The Court of Appeal granted the injunction as to future dividends, but refused it as to the dividend already declared, on the ground that the plaintiff shewed no title to share in such dividend, and that the general body of the shareholders who were interested in the dividend was not adequately represented (2). But in *Browne v. Monmouthshire Railway and Canal Company* (3), the Master of

The arbitrary powers given to public companies are granted in consideration of an expected public benefit, and companies must keep within the limits of their powers; and the Court restrained payment (here) of future dividends until a branch line, not completed within the time limited, had been completed.

(1) *Williams v. South Wales Railw. Co.*, 1 Mac. & G. 689; 2 H. & T. 366; 6 Co., 3 De G. & Sm. 354. Railw. Cas. 682; 13 Beav. 295; 6

(2) *Carlisle v. South Eastern Railw.* Railw. Cas. 670.

(3) 13 Beav. 32.

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The non-completion of a railway by the time for completion is a public wrong, and the Court refused (at the suit of a shareholder) an injunction to restrain payment of dividends until completion of railway, &c.

the Rolls, Lord Langdale, said it was not settled to what extent, or subject to what particular limitations, the jurisdiction of the Court ought to be exercised in preventing or checking the erroneous conduct of corporations created by Act of Parliament for public purposes, and that unless Parliament should think fit to lay down rules for the guidance of the Court, litigation must ensue; but that the classes of cases in which this Court had often been called on to interfere were those which arose out of a combination of—first, acts in themselves illegal, considered as breaches of contract with the public; secondly, acts which were breaches of contract, express or implied, with the subscribers to the undertaking; and, thirdly, acts erroneous, or breaches of contract incapable of being rectified by the shareholders themselves, in the exercise of their own powers; and that it was necessary in such cases to distinguish between the duty of the governing body to the public and their duty to the shareholders. And where after the expiration of the time for completing a railway, which by their Act the company were “required” to make, a bill was filed by a shareholder, on behalf of himself and all the other shareholders, seeking to restrain the company from making any dividend until they had completed the railway and branches; a general demurrer was allowed on the ground that the non-completion being a public wrong, or violation of duty to the public, the Court had no jurisdiction to interfere (1), and that the misapplication of the income was the subject of internal regulation; and that this Court does not attempt to direct the performance of all the duties which the governing bodies of such companies owe to the shareholders, but, on the contrary, leaves to the companies themselves the enforcement of all the duties arising out of matters which are the subject of internal management; and that it could not be safely said that in no case whatever joint stock companies ought to be allowed to divide any profits, or receive any tolls, until all their works have been completed; and in this case the Court expressed its disapproval of the practice of filing demurrers in railway and joint stock company cases on mere formal and technical grounds (2).

(1) *Et vide The Skinners Co. v. The Irish Society*, 7 Beav. 593; affirmed, 12 Cl. & F. 425; that though the Crown may in such cases, by informa-

tion or other proceeding, interfere, a private suit cannot be sustained.

(2) *Browne v. Monmouthshire Railway and Canal Co.*, 13 Beav. 32.

54. Where a railway company, having acquired a legal right to and possession of land, had constructed their railway over the same under the provisions of their Act, another railway company, to whom the Legislature had given power to purchase the same land for the purposes of their undertaking, was restrained by injunction from exercising such power pending the trial of the legal question of the effect of such conflicting powers (1); and the Vice-Chancellor, Sir G. J. Turner said, that the case appeared to involve a general question of law of no little consequence—what is the effect of two Acts of Parliament relating to a special subject, and conferring the same right on different parties? (2)

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The Court will, pending a trial of the legal question of conflicting powers, restrain one company exercising a power of purchasing land where another company had already under their own powers taken the land and constructed their railway.

55. Where land is taken by a railway company, not under their compulsory powers, but by private contract, the jurisdiction of the Court of Chancery to secure to the vendor the easements he contracted for is not ousted by the provisions of the Railways Clauses Consolidation Act (8 Vict. c. 20); and the Master of the Rolls, Lord Langdale, decreed specific performance of an agreement to make certain easements of roads, ways, &c. (3).

Where land is taken by a railway company by private contract, the Court has jurisdiction to secure vendor easements contracted for.

56. Where an incorporated railway company had issued new shares in pursuance of a resolution declaring the purpose of such new issue to be the raising of a sufficient amount to pay off the existing mortgage and bond debts of the company, and a holder of some of the new shares filed a bill, on behalf of himself and other holders of the shares, against the directors and the company, alleging facts to shew, and charging, that they were about to apply the money paid in respect of the shares otherwise than in conformity with the resolution, and praying for a declaration that the money ought to be applied according to the terms of the resolution, and for a specific performance of the agreement thereby entered into, and for an injunction; the Court held, allowing two separate demurrers of the directors and the company, that the case fell within the authority of the cases then cited (4), for the pur-

(1) *Manchester, Sheffield, and Lincolnshire Railw. Co. v. Great Northern Railw. Co.*, 9 Hare, 284.

(2) *Ib.*

(3) *Sanderson v. Cockermouth and Workington Railw. Co.*, 2 H. & T. 327; 11 Beav. 497.

(4) *i.e.* *Mozley v. Alston*, 1 Phil. 790; *Foss v. Harbottle*, 2 Hare, 461; *Exeter and Crediton Railw. Co. v. Buller*, 11 Jur. 527; *Lord v. Copper Miners' Company*, 2 Ph. 740; and see *Edwards v. Shrewsbury and Birmingham Railw. Co.*, 2 De G. & Sm. 547, n. (b), *et S. C.*, *post*, p. 892.

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pose of shewing that the intended acts with which the defendants were charged, if wrong, were a wrong to the company generally, and, therefore, not the proper subjects of a suit framed as this was, that is to say, a suit by a particular class of shareholders against the company; but the costs of only one demurrer were allowed, the Vice-Chancellor, Sir J. L. Knight Bruce, remarking he did not understand why there should have been two (1). Where, after the creation of the original shares in a railway company, a further capital (authorized to be raised by one of the Acts of the company) was raised in half shares, upon which a resolution of the directors guaranteed interest at six per cent. for ten years; on a motion, by a holder of original shares, to restrain the company from paying any interest or dividends on the half shares, in preference to dividends or interest on the original shares, out of any profits derived from any other capital than that which at the date of the resolution had been or could be raised under the provisions of the company's Acts, and from paying any preferential interest or dividends on the half shares while any of the floating or unsecured debt of the company was unpaid, except out of the clear and divisible profits of the current half year, the company entered into an undertaking not to make such payment, unless under the authority of Parliament, until the hearing of the cause or further order; and by a subsequent Act of Parliament it was enacted that it should be lawful for the company to commute the guarantee attached to the half shares into any other guarantee or privilege, perpetual or terminable, which should be agreed upon by four-fifths of the shareholders of the company, at meetings after notice as therein mentioned; and the directors thereupon proposed to commute the guarantee into an annual payment for each half share in perpetuity; upon a motion to restrain the company from in any manner acting on, or giving effect to, the proposed scheme for the commutation of the guarantee, or from declaring or paying any commuted or other dividend on the original or half shares while any of the unsecured debt remained due, and except out of the clear profits of the current half year, and so far as such profits should be sufficient after payment of such debt, and upon a cross motion to discharge the undertaking,

(1) *Yelts v. Norfolk Railw. Co.*, 3 De G. & Sm. 293.

the Court held, that the Act of Parliament authorizing the commutation did not contain any such authority as would take the case out of the undertaking; that is to say, the undertaking was binding until the hearing of the cause or the further order of the Court; that the undertaking was not an agreement which bound the defendants to do nothing in the matter the subject of the injunction, except under the order of the Court, or unless the Court should be of opinion that what they proposed to do was proper to be done, but was in the nature of an injunction obtained without argument, and which the defendant might apply to discharge; that upon the construction of the resolution the holders of half shares were entitled to the guaranteed six per cent. out of any funds of the company which could be lawfully so applied, and, therefore, out of the further profits before any dividend could be payable upon the whole shares; that independently of the construction of the resolution, the Act of Parliament having authorized a commutation of the guarantee, and the commutation having received the consent required by the Act, the company might lawfully carry it into effect; that the principles which apply to partnerships composed of a limited number of persons, apply to these great companies, and that the majority of the partners in a partnership of a limited number, constituted with similar provisions as to profits, and the payment of dividends thereout, and bringing capital by instalments, could over-rule the minority upon the question, whether profits should be divided while debts of the partnership were unprovided for; that the manner in which profits were to be ascertained and divided was a question of internal management with which the Court could not interfere (1). Where a shareholder in an incorporated railway company filed a bill on behalf of himself and other shareholders to restrain the directors from issuing preference shares, on the ground that they were about to be issued contrary to the company's Acts, and for the purpose of constructing the original line instead of the branch (for which alone additional shares were to be created), and were intended to be distributed in a manner contrary to the directions of the Act, which authorized the creation of additional shares; and the bill, filed on the 22nd of September, stated that the plaintiff

(1) *Stevens v. South Devon Railw. Co.*, 9 Hare, 313.

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on the 17th of September became aware of resolutions passed on the 12th of September, under which the preference shares were to be offered to the shareholders on the 23rd of September, but the bill did not otherwise shew that the plaintiff had not the means of procuring a suit to be instituted in the name of the corporation; Vice-Chancellor Sir J. L. Knight Bruce, held, on the demurrers of the corporation and of the directors to the bill, that these demurrers could not be overruled consistently with the principle stated in, or to be extracted from, *Foss v. Harbottle* (1); *Mozley v. Alston* (2), and *Exeter and Crediton Railway Company v. Buller* (3), whether the proceedings sought to be restrained were legal or not (4); and on the bill being amended, and stating that a majority of the shareholders supported the views of the directors, and refused to authorize the plaintiff, or any other person, to institute a suit in the name of the company; the Court held, allowing a demurrer, that it was still within the influence of the above authorities. But the corporation and the directors having demurred separately, the Court refused to give costs of more than one demurrer; and the Vice-Chancellor said he doubted whether there was sufficient clearness or precision in the description of the class on whose behalf, as well as his own, the plaintiff professed to sue, the expression being "on behalf of himself, and all other" the shareholders in an incorporated company, "except such of the other shareholders as are respectively represented by those shareholders hereinafter named defendants" (5). Where, at a meeting of a railway company, on the 31st of May, 1848, it was resolved that £1,055,000 should be raised by 105,500 preference shares of £10 each, on which a fixed dividend of six per cent. should be paid; and on the 7th of July, 1848, one of the dissentients filed a bill praying a declaration that this resolution was unauthorized by the company's Act, and praying for an injunction against the issue of such shares, and no other specific relief; and upon a motion made upon the 7th of August, 1848, for an injunction accordingly, it appeared by the affidavit of the secretary that the

(1) 2 Hare, 461.

(2) 1 Ph. 790.

(3) 11 Jur. 527; 5 Railw. Cas. 211;
16 L. J. (Ch.) 449.

(4) *Edwards v. Shrewsbury and
Birmingham Railw. Co.*, 2 De G. &

Sm. 537.

(5) *Ib.*

preference shares had been offered to all the shareholders rateably, and had been taken to the amount of £777,770, on which the first instalment had been paid, and that other shareholders had expressed their desire to accept other shares, and that there were only five dissentients; the Vice-Chancellor, Sir J. L. Knight Bruce, held, that the motion was the whole cause, and (having regard to the balance of mischief likely to result from interfering, or refusing to interfere, on an interlocutory application,) thought the Court ought not, and refused, to grant the injunction, without prejudice to any question and without costs (1).

57. Where a railway company had power to make and maintain the railway and works on the line and upon the lands delineated in the parliamentary plan and described in the book of reference, and to enter upon, take, and use the said lands, or such of them as should be necessary for that purpose, but they were not to enter upon, take, or use any of the land or property of a certain pre-existing railway company, or in any manner to alter, vary, or interfere with that railway, or any of the works appertaining thereto, save only for the purpose of effecting the junction thereby authorized, in manner in the said Act authorized, and not otherwise; one of the clauses of the Act giving certain powers to the company for effecting a junction with the pre-existing railway; the Court held, that there being nothing to shew that it was absolutely necessary for the company, in order to effect the junction, it had no power to take, as owners, certain lands which the line of the pre-existing railway actually passed; but that there was a right to enter upon such lands by way of easement for the purpose of effecting the junction (2).

58. Where a railway company were building an embankment more than five feet above the level, according to the 11th and 12th sections of the Railways Clauses Consolidation Act, but they had not given the notice required by the 12th section, but had obtained the consent required by the 11th; the Court put them on terms to take the opinion of the Board of Trade, submitting to such

(1) *Fielden v. Lancashire and Yorkshire Railw. Co.*, 2 De G. & Sm. 531. *Hampton Railw. Co. v. South Staffordshire Railw. Co.*, 1 Drew. 255.

(2) *Oxford, Worcester, and Wolver-*

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order as this Court should thereafter make, otherwise an injunction would go to restrain the company from proceeding with the embankment (1).

Although the Court can in a proper case restrain one party entering into agreements with another party, inconsistent with a subsisting agreement between a plaintiff and the former party, yet it will refuse the injunction where the inconvenience of granting is greater than that of refusing it.

The Court will preserve property *pendente lite* where there is a fair question as to the existence of a right, and expediency, upon the balance of convenience and inconvenience, is not against granting the interim injunction.

Where the alternative is interference or probable destruction of property, the Court is ready to lend its immediate assistance.

59. In the *Shrewsbury and Chester Railway Company v. Shrewsbury and Birmingham Railway Company* (2), Vice-Chancellor Lord Cranworth refused, on motion, an injunction to restrain the defendants from entering into an agreement with another railway company which would be a violation of, or inconsistent with, a subsisting agreement between the plaintiffs and the defendants, the inconvenience to arise from granting the injunction being greater than the inconvenience to arise from refusing it, but made no order. The Vice-Chancellor said that as to costs this Court will, where the necessity of the case requires it, interfere by injunction during litigation, not only to preserve property *in statu quo*, but sometimes, also, to prevent the defendant from affecting it by contracts, or conveyances, or other acts; but that this latter interference is by no means a matter of course (3). When the Court is called on to interfere to preserve property *pendente lite*, the Vice-Chancellor said he apprehended there were two points on which the Court must satisfy itself. First, it must satisfy itself, not that the plaintiff has certainly a right, but that he has a fair question to raise as to the existence of such a right (4). And the Vice-Chancellor said he conceived that even where it was made out that there was a point to be decided which the plaintiff was fairly raising, still there was a further (*i.e.* 2nd) question, namely, whether interim interference, on a balance of convenience and inconvenience to the one party and to the other, is or is not expedient? Where the alternative is interference or probable destruction of the property, there, the Vice-Chancellor said, of course the Court will be very ready to lend its immediate assistance, even at considerable risk that it may be encroaching on what may eventually turn out to be a legal right of the defendant. But where, on the other hand, the only

(1) *Pearce v. Wycombe Railw. Co.*, S. C. *ante*, p. 219.

1 Drew. 244; 17 Jur. 660.

(2) 1 Sim. (N. S.) 410; 20 L. J. (N. S.) Ch. 574; 15 Jur. 548.

(3) See Lord Eldon's remarks in *Spiller v. Spiller*, 3 Swan, 556; *et v.*

(4) See Lord Cottenham's remarks in *Great Western Railw. Co. v. Birmingham and Oxford Junction Railw. Co.*, 2 Phil. 597, 602, 603.

evil to result from non-interference is that the plaintiff may, by the contracts or deeds of the defendant, be retarded or embarrassed in his litigation, there the Court will be far more ready to listen to any suggestion of the defendant, shewing that interference during litigation will prejudice his rights; and the Vice-Chancellor said the ground on which he felt himself bound in this case to refuse the injunction was that, although he was perfectly satisfied of the authority of this Court to issue an injunction, not merely to restrain parties from doing acts, but also from entering into contracts pending litigation that might embarrass the plaintiff in his suit, and that the Court was entitled to do so whenever it saw there was a fair ground for litigation raised by the plaintiff; yet that that right of the Court must be guided by a discretion not to exercise it where it sees that, on the balance of convenience and inconvenience between interim interference and non-interim interference, the balance greatly preponderates in favour of the defendant and against the plaintiff.

60. Where a railway contractor had entered into two distinct contracts (No. 1 and No. 3) with a company for the performance of railway works, wholly unconnected and distinct, and the contractor had brought his action at law to recover a balance on contract No. 1, and the company filed their bill, alleging complexity in the accounts, and a title to various items of set-off, and that the accounts of contract No. 1 and contract No. 3 had become so blended that a Court of Law could not properly adjudicate upon them; and praying that the accounts of both contracts might be taken in this Court, and for an injunction to restrain the action; and the contractor, by his answer, denied the complexity and the blending of the accounts, but admitted that he had received various large sums of money, which the company had appropriated to contract No. 1; other large sums which the company had appropriated to contract No. 3; and other large sums which the company had not appropriated to either contract, but which he had appropriated partly to contract No. 1, and partly to contract No. 3; Lord Chancellor Truro held, that the question of the contractor's right to appropriate the general payments as he had done, had, in this way, blended the two accounts, and involved the necessity of going into the accounts of contract No. 3; but that it being equally

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This Court can not merely restrain parties doing acts, but also from entering into contracts pending litigation that might embarrass plaintiff in his suit.

Where it is equally possible to take at Law two accounts under two con-

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tracts, the blending of the two accounts is no reason for withdrawing the case from a Court of Law, but where there are other claims which it would be impossible for any Court at *nisi prius* to get through, an injunction will be granted to restrain an action on one of the two contracts.

A plaintiff as one of the public cannot file a bill alone, to restrain a railway company from closing it; the Attorney-General must be a party.

possible to take at Law, with justice to both parties, the accounts under both contracts, the blending of the two accounts formed no reason for withdrawing the case from the jurisdiction of a Court of Law, but that, besides the claims which were covered by the declaration in the action, the contractor having claimed, in the schedule to his answer, divers sums of money for work done, the amount of which had not been ascertained, and other matters in respect of which he had claims on the company, such as for general "expedition in the works," for "losses occasioned by delays," for "loss of profit by re-auction of quantities of works," and "for other breaches of, and deviations from, the contracts;" these, the Lord Chancellor said, it would be quite impossible for any Court sitting at *nisi prius* to get through; and that they could only be satisfactorily tried under the direction and superintendence of this Court, and that, therefore, the injunction was proper (1).

61. Where a plaintiff sued, as one of the public, to restrain a railway company from closing it (the Attorney-General not being a party), the Master of the Rolls (Lord Langdale), held that a suit in such a form could not be maintained (2).

62. Where disputes had arisen between a railway company and a contractor employed in making the railway, and the company, insisting upon a right under the contract, owing to the alleged default of the contractor, to discharge him, took possession of the line and materials and completed the works themselves, and the contractor resisted such claim, imputing the backward state of the works to the acts of the company, and holding forcible possession, and collisions occurred between the workmen of the two parties, each being charged with impeding the operations of the other; and the completion and opening of the railway for traffic being in the meantime delayed; the Court, on the application of the company, restrained the contractor from continuing on the line or interfering with the operations of the company, and directed an account of what was due to the contractor for works and materials done and provided, without regard to the formal certi-

(1) *South Eastern Railw. Co. v. Dock Co.*, 13 Beav. 10; *v. Browne Brogden*, 3 Mac. & G. 8; 14 Jur. 795; *v. Monmouthshire Railw. and Canal Co.* 13 Beav. 32, *et v. S. C.* p. 887, *v. S. C. ante*, p. 481.

(2) *Thorne v. Taw Vale Railw. and ante.*

cates of the company's engineers, and an issue to try whether the company, at the time they proceeded to enter upon the works and remove the contractor, were lawfully justified in so doing, reserving as well the question of the right of the contractor to compensation for loss of profit on unexecuted works, as all other directions, until after the trial and the report (1).

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63. To the bill of a company against the holder of a cheque alleged to be fraudulently drawn by three directors (who were not made parties to the bill), seeking to have it delivered up, and an injunction against an action; Vice-Chancellor Sir J. L. Knight Bruce held the bill demurrable, on the ground that, according to the statements in the bill, the instrument on which the action was brought neither made the plaintiffs liable (at Law) nor purported to make them liable (2).

64. The words "injuriously affected," in the 68th section of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), comprehend cases of damage arising from the user of the railway, as well as of a damage sustained in the construction of the railway. And an injunction obtained by a company restraining a landowner from taking proceedings under the Act in respect of such damage was dissolved by Lord Chancellor Truro (3). The damage in this case arose from the vibration of the buildings caused by engines and carriages passing through a tunnel adjoining the defendant's premises, a public house, and consequent injury to the beer in the cellars. In this case Vice-Chancellor Lord Cranworth had granted the injunction, acting on the decision of Lord Chancellor Cottenham in *London and North Western Railway Company v. Smith* (4), but which Lord Chancellor Truro, in the *East and West India Docks and Birmingham Junction Railway Company v. Gattke* (5) disclaimed any intention to overrule. In the case of the *East and West India Docks and Birmingham Junction Railway Company v. Gattke* (6) it was held that the words "injuriously affected" in this section comprehend cases of injury independent of taking

"Injuriously affected," in sect. 68 of Lands Clauses Consolidation Act, comprehend cases of damage from user, as well as that sustained in the construction of a railway—as, damage arising from vibration, dust, dirt, temporary diversion of foot-path, or stoppage of a lane.

(1) *East Lancashire Railw. Co. v. Hattersley*, 8 Hare, 72. *Railw. Co. v. Bradley*, 3 Mac. & G. 336; 6 Railw. Cas. 551.

(2) *Derbyshire, Staffordshire, and Warwickshire Railw. Co. v. Serrell*, 2 (4) 1 Mac. & G. 216.

De G. & Sm. 353; 12 Jur. 826. (5) 3 Mac. & G. 155; 6 Railw. Cas. 371.

(3) *London and North Western* (6) *Supra*.

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land, and are not limited to damage sustained by persons whose lands, or a part of whose lands, are taken, used, or directly interfered with, and the right to compensation extends to, and may be asserted in respect of, consequential damage; and, therefore, where a lessee of premises not required for the purpose of a railway served a notice and claim upon the company for a certain amount of compensation under the 68th section of the Lands Clauses Consolidation Act, and the alleged injuries resulted from the dust and dirt occasioned by the works of the railway, from the temporary diversion of a footpath which passed along the premises of the claimant, and from the stoppage of a lane along which the lessee claimed to be entitled to a right of way to the back of his premises; and the company filed their bill, and obtained an injunction to restrain any further proceedings under the notice; Lord Chancellor Truro held, dissolving an injunction which had been granted by the Vice-Chancellor, Sir J. Wigram, that the claimant was entitled to proceed under the notice, and to have the amount of compensation assessed by a jury. And by summoning a jury to assess the amount of compensation claimed by a party under this section the company is not precluded from questioning the right of the claimant to any compensation whatever: and the jury have jurisdiction to construe the Act upon the point whether the claim made is within its provisions (1). Where upon a motion for an injunction to restrain the user of a temporary ballast line of railway, laid down for the purposes of the construction of a permanent line, in such a manner as to cause injury to the plaintiff's houses, very considerable damage having already been done to the houses, it appeared at the hearing of the motion that the ballast line had been wholly removed, the motion was refused, the Court reserving the consideration of costs (2); and in cases of this nature the Court will not grant an injunction *ex parte* (3).

65. Where a railway company consenting to the removal of their plant by the plaintiffs, the contractors for works, and the latter not having on affidavits made out a case of *mala fides* on the part of the engineer or the company in determining the contract, a

(1) *East and West India Docks and Birmingham, &c. Junction Railw. Co. v. Gattke*, 3 Mac. & G. 155; 6 Railw.

Cas. 371.

(2) *Shersby v. South Eastern Railw. Co.* 13 Jur. 689.

(3) *Ib.*

motion for an injunction against the company was refused, and the latter was left to assert at Law its right under the agreement (1).

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66. Where a plaintiff filed a bill on behalf of himself and other shareholders in a railway company to restrain the directors committing a breach of trust, and it appeared that he was suing at the instigation of another rival company; the Master of the Rolls, Lord Langdale, held, that this circumstance was not of itself sufficient to prevent him obtaining a special injunction on the merits of the case (2).

The fact that a plaintiff has filed his bill to restrain directors committing a breach of trust, at the instigation of a rival company, does not disentitle him to an injunction.

67. Where an injunction had been obtained restraining the members of the managing committee of a railway company from obtaining payment of the deposit out of Court on account of alleged misconduct on the part of the company, and it afterwards appeared that the deposit had been paid out of a fund which was the joint property of that railway company and of two others which had been amalgamated with it, the injunction was dissolved as to a part of the deposit proportionate to that part of the fund which was the property of the other companies (3).

68. Where a man, having property from which he had no right of way through a particular street, bought a piece of land for the purpose of obtaining it, and a railway company proposed to form their line so as to interfere with the alleged right of way, the Court refused to interfere by injunction, considering the evidence of the right of way deficient, but gave leave to the plaintiff to bring an action (4).

69. Where a railway company, having power to purchase a plot of land for their railway, entered upon the same to survey and take levels thereof, and probe or bore to ascertain the nature of the soil, and set out the centre line of the railway, and for that purpose dug a trig line, or trench, two inches deep and fourteen inches wide, across the plot of land, but gave the owner of the land no previous notice of such entry, as required by the 84th section of the Lands Clauses Consolidation Act (8 Vict. c. 18); and five days after the trig line was made the owner of the land dis-

(1) *Waring v. Manchester, Sheffield, and Lincolnshire Railw. Co.*, 2 H. & T. 239; 18 L. J. (N.S.) Ch. 450; 14 Jur. 613; *v. S. C. p.* 483-4, *ante*.

(3) *Goodman v. De Beauvoir*, 10 Jur. 938.

(4) *Hadfield v. Manchester South Junction and Altrincham Railw. Co.*

(2) *Colman v. Eastern Counties Railw. Co.*, 10 Beav. 1.

12 Jur. 1083.

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covered the fact, and nine days from such discovery he filed his bill for an injunction; upon the affidavits on the part of the company, that the surveying and setting out of the line of railway was completed on the day the line was made, and that they had no occasion to enter, and did not intend again to enter upon the land until they had taken the legal steps for permanently using it; the Court refused the injunction, but reserved the costs (1).

The Court will restrain a company from proceeding except as to what is included in their notice; the proceedings before the jury must be consistent with the precept, and the precept with the notice.

One Judge in Chancery can, upon bill, restrain payment out of Court of the Parliamentary deposit moneys, ordered by another Judge upon petition.

Where landlord purchases his lessee's interest, and afterwards, under a power, determines the lease, the relation of vendor and purchaser is established, and Court will restrain eviction of tenant until amount of compensation is settled between the parties.

70. The Court will restrain a company from proceeding except with relation to what is included in their notice to the owners, and the jury from assessing the value of any other land than that for the purchase of which the owner has been required by the notice to treat; and the proceeding before the jury must be consistent with the precept, and the precept with the notice (2).

71. In *Petley v. Eastern Counties Railway Company* (3) an injunction to restrain pulling down houses was granted *ex parte* after an appearance by the defendant.

72. Where one of the Judges of the Court of Chancery has made an order on petition for payment out of Court of moneys deposited by the committee of management of a railway company, under the Standing Orders of the House of Commons, one of the other Judges of the Court has jurisdiction upon a bill filed to grant an injunction to restrain the company from receiving the money (4). And in *Gilbert v. Cooper* (5), and *Lewis v. Cooper* (6), the Court granted an injunction to restrain the payment out of Court to the directors of a railway company, of the parliamentary deposit.

73. Where a landlord, having power to determine a lease, entered into an agreement with the lessee under which he became purchaser of his interest, and then gave notice to determine the lease; the Court held, that the relation of vendor and purchaser was established, and would not allow the tenant to be evicted until the question as to the amount of compensation or purchase money was settled between the parties (7).

(1) *Fooks v. Wilts, Somersct, and Weymouth Railw. Co.*, 5 Hare, 199.

(2) *Stone v. Commercial Railw. Co.* 4 My. & Cr. 122; 1 Railw. Cas. 375.

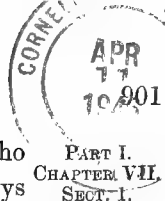
(3) 8 Sim. 483; 8 L. J. (N. S.) Ch. 209; 3 Jur. 21.

(4) *Castendieck v. De Burgh*, 4 Railw. Cas. 381; 15 L. J. (N. S.) Ch. 425.

(5) 4 Railw. Cas. 396.

(6) 4 Railw. Cas. 413.

(7) *Doe v. London and Croydon Railw. Co.*, 8 L. J. (N. S.) Ch. 201.



74. Where a railway company filed a bill against surveyors who had brought an action at Law against them in respect of surveys made by them for the company, and other matters connected with those surveys, and for moneys expended by them for the company, and the bill alleged that, with the discovery thereby asked for, the company could successfully defend the action, and the company afterwards, when the action was nearly ready for trial, applied for an injunction on the ground that the accounts were too complicated to be taken in an action at Law; Lord Chancellor Cottonham (affirming a decision of the Vice-Chancellor of England) refused the application, on the grounds that it was not a case of mutual accounts, and that, being a matter of concurrent jurisdiction with the Courts of Common Law, the plaintiff should not have delayed applying for the injunction until up to the period of trial (1).

The Court refused to restrain an action by surveyors of railway company in respect of surveys, &c., it being a matter of concurrent jurisdiction with Courts of Law, and being a delay until trial in applying for the injunction.

75. In *Pickford v. Grand Junction Railway Company* (2) it was held, that where an option was given to a party sending packages, containing small parcels, to pay according to an average, or to pay for the parcels separately, if the principle of an average were legal, and the amount of it reasonable, although the alternative requiring the party to pay for the separate parcels might be *per se* illegal, that that would not render the demand to pay according to average illegal, and that the Court would not grant an injunction until the illegality were established at Law. But *quære*, whether the defendants, being carriers only to Birmingham, could legally have made the same charge to A. for delivery of goods at Birmingham as they made to B. for delivery of goods at Worcester, B. having agreed to give the company their whole custom, and to pay on certain articles an increased price (3).

76. Where the defendants, not being possessed of compulsory powers for taking land for the purpose of a railway, and it being necessary for them, in order to complete their line, to cross the plaintiff's railway, gave notice of their intention of crossing the same, but were restrained by injunction from so doing until the question

The Court dissolved an injunction so far as to enable a company to cross another line, so that it might be able

(1) *South Eastern Railw. Co. v. Martin*, 2 Ph. 758; 1 H. & T. 69; 5 Railw. Cas. 454, 478; 13 Jur. 1; 12 Jur. 1062. (2) 3 Railw. Cas. 538; see now the Railway Traffic and Canal Act, 1854, *post*, part iv., ch. 1, s. 2. (3) *Ib.*

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to perform its contract with an owner of land.

Semble, companies have a right to carry on their line according to the plan, although a contemplated junction may be frustrated by abandonment of the line with which it was intended to unite.

The Court cannot restrain a company that has already solicited a bill to obtain an enactment that Courts should have no power to compel removal of works—from further soliciting such bill—notwithstanding it is in violation of an undertaking.

Parties injured by

of right could be decided at Law; and they had entered into a contract with an owner of land on one side of the plaintiff's railway, by which a way-leave was to be granted if the line were completed within a certain time; but this injunction would render it impossible for them to complete their contract; the Court held, that the injunction should be dissolved so far as to enable the defendants to complete their contract (1). And, *semble*, that companies have a right to carry on their railway according to the plan laid down in their Act, although a junction contemplated in procuring such Act may be frustrated by the abandonment of the line with which it was the original intention of the company to unite. And the Court will not consider mere inconvenience in the light of injury (2).

77. Where a railway company, as the terms of being permitted to proceed with certain works pending a trial at Law of the question whether such works were in conformity with the directions of an Act of Parliament, undertook to deal with the works as the Court of Chancery should afterwards direct, and before the trial had taken place the company, without notice to the other parties in the cause, petitioned the House of Commons for leave to bring in a bill one of the clauses of which proposed to provide that in all proceedings at Law and Equity the works which had been done should be considered as a compliance with the Act of Parliament; and that there should be no power at Law or in Equity to compel the removal thereof, and the petition was received, and the bill containing such clause was introduced in the House of Commons; the Court held, that although the conduct of the company was a violation of the undertaking entered into by them, it had no jurisdiction to restrain the company from further soliciting the bill, which, having been entertained by the House of Commons, had become the proceeding of the Legislature, and not of the petitioners (3).

78. Parties injured by the conduct of a railway company, in

(1) *Clarence Railw. Co. v. Great North of England, Clarence, and Hurllepool Junction Railw. Co.*, 2 Railw. Cas. 763; 6 Jur. 269.

(2) *Ib.*

(3) *Att.-Gen. v. Manchester and Leeds Railw. Co.*, 1 Railw. Cas. 436.

exceeding the powers conferred upon them by Act of Parliament, are entitled to the most effectual remedy within the power of a Court of Equity; and where it appeared that the injury complained of would be remedied by suspending an injunction, an injunction which had been granted was suspended for three weeks (1).

conduct of a railway, are entitled to the most effectual remedy within the power of a Court of Equity.

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79. Where, in an amalgamated railway company, there were three classes of shareholders, and a shareholder of one class filed a bill on behalf of himself and all others of the class, stating that an unfair and unnecessary call had been corruptly made on that class, which some had paid, but that the plaintiff had refused to pay it, and praying that an account might be taken to ascertain the propriety and necessity of the call, and for an injunction; the Master of the Rolls, Lord Langdale, held, that this was an attempt to induce this Court to interfere in the internal management of the affairs of a continuing company, and to take upon itself to determine a question which might well and ought to be determined by the shareholders themselves at general meetings, and a general demurrer to the bill was allowed; and the Court also held that the bill was defective as to parties, in suing on behalf of all the shareholders of the same class as the plaintiff, as well those who had paid the calls as those who had not, and in not sufficiently alleging that the other two classes of shareholders were represented by the defendants; and upon a proposal to read clauses of the Act not set out in the bill, also held that you could not, upon demurrer, go out of the record (2).

The Court will not interfere in the internal management of the affairs of a continuing company, and dismissed a bill asking to restrain (here) a call upon one of three classes of shareholders.

80. Where a shareholder in a line of railway projected by A. filed a bill on behalf of himself, &c., against the members of the provisional committee, alleging that they had abandoned the line in favour of one projected by B., and alleging misconduct, &c., and praying an account, a receiver, and an injunction, a demurrer for want of equity and for want of parties was overruled without prejudice, and the costs, with the consent of all parties, were reserved (3). Where, on the winding up of an abandoned railway

(1) *Spencer v. London and Birmingham Railw. Co.*, 1 Railw. Cas. 159. Co., 12 Beav. 433; 6 Railw. Cas. 256.

(3) *Wilson v. Stanhope*, 4 Railw. Cas. 251.

(2) *Bailey v. Birkenhead, Lancashire, and Cheshire Junction Railw.*

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scheme, several members of the provisional committee contributed sums for liquidating the liabilities; on a demurrer for want of parties to a bill by one member of the provisional committee, against whom an action had been brought by a creditor on behalf of himself and all other persons interested as partners in the company, except the defendants, alleging that no shares had been allotted, but that the defendants had received such contributions and other property, and were misapplying them, the Lord Chancellor held (reversing a decision of the Court below), that as the alleged contributions appeared to be purely voluntary, the plaintiff had no title to relief in respect of them, at all events, in the absence of the parties by whom they had been made, and allowed the demurrer (1).

A bill to restrain purchaser entering on the land before completing contract, is sustainable without making a tenant of the land, a party.

81. Where a bill was filed by a vendor against a purchaser averring that before completing the contract the purchaser had entered on the land, and praying a specific performance, and in the meantime an injunction to restrain the defendant from entering on, or continuing to hold, the premises; the Court held, that a tenant of the land contracted to be sold is not a necessary party (2).

82. Where a notice under the usual power contained in Railway Acts to treat for part of a rope walk in the line of the railway, was accompanied by a diagram or plan of the entire rope walk, indicating by coloured lines the manner in which the railway would intersect it, and the portion required to be treated for, but having no scale of admeasurement appended to the diagram or plan, the Court held that the notice was sufficient (3).

Owner of property not required for railway has no right to enforce against company provisions of sect. 68 of Lands Clauses Consolidation Act, on an allegation that his property

83. The owner of property not required for the purposes of a railway has no right to enforce, as against the company, the provisions of the 68th section of the Lands Clauses Consolidation Act, 1845, on the allegation that his property is injuriously affected by the execution of the company's works. And where a railway company permanently stopped up the passage through a street in a populous town, and the owner of certain houses and other buildings in that street, not directly affected by the railway works,

(1) *Sharp v. Day*, 1 Ph. 771; 4 Railw. Cas. 261; 10 Jur. 469.

(2) *Robertson v. Great Western Railw. Co.*, 1 Railw. Cas. 459.

(3) *Sims v. Commercial Railw. Co.*, 1 Railw. Cas. 431.

and at a distance of 126 feet from the boundary line of the railway, gave notice in writing to the company, under the 68th section of the Lands Clauses Consolidation Act, 1845, claiming a sum of money as compensation in respect of his property being "injuriously affected" by the permanent stoppage of the street, and requiring the company, in case they declined to pay that sum, to summon a sheriff's jury to assess the damages sustained by him; the Lord Chancellor Cottenham, reversing a decision of the Vice-Chancellor of England, held, on a bill filed by the company to restrain the owner of the houses, &c., from proceeding upon the notice, and from taking any other proceeding to recover the sum claimed by him, that it was a proper case for an injunction, and directions were given by the Court that the owner of the houses, &c., should bring his action at Law to try his right in the first instance, and the Court gave liberty to either party to apply after the trial of the action, the parties undertaking to use the judgment under the direction of the Court (1).

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is injuriously
affected by
the execution
of the com-
pany's works.

84. After judgment at Law, finding payment made to the railway company to be overcharges, a bill filed pending a writ of error on that judgment to restrain the company from continuing the overcharges, and for an account, &c., is not improper nor premature, and the plaintiffs are entitled to the costs (2).

85. Where three directors of a railway company drew a cheque for payment of a sum of money, and the same was countersigned by the secretary, and the cheque was in the names of the three, but did not describe them as directors; on an action brought against the company by the holder of the cheque, a bill was filed by the company against him, in which fraud was alleged in the drawing of the cheque, and which prayed that it might be delivered up to be cancelled, and that the action might be stopped; the Court held, that the drawers of the cheque were necessary parties to the suit (3).

86. The plaintiff must satisfy the Court that he has sustained

(1) *London and North Western Railw. Co. v. Smith*, 1 H. & T. 364; S. C. at Law, 2 Man. & G. 134; 3 Id. 956; 8 Scott, 641; 11 Cl. & F. 590.
1 Mac. & G. 216; 5 Railw. Cas. 716;
13 Jur. 380, 485.

(3) *Derbyshire, Staffordshire, and Worcestershire Junction Railw. Co. v. Serrell*, 12 Jur. 826.

(2) *Burrett v. Stockton and Darlington Railw. Co.*, 1 H. L. C. 18; see

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substantial damage from the violation of a legal right to entitle him to an injunction; and where a railway company had entered on land which they had purchased, and had proceeded to make their line in a manner exceeding their powers of vertical deviation, on a motion for an injunction, the Lord Chancellor, varying the order of the Vice-Chancellor, directed an action to be brought immediately, and the motion to stand over (1).

Where the matter in dispute is distinctly raised and ready for decision, the right should be declared, and the injunction founded thereon.

Action against shareholder by creditor of company restrained (here).

87. Where the matter in dispute is distinctly raised by the motion for an injunction, and is ready for decision, the right should be declared, and the injunction founded thereon, that the order may inform the defendant what the opinion of the Court is as to the limits of his right, and not expose him, in the exercise of such right, to the consequences of violating a vague injunction (2).

88. Where the plaintiff, who was a shareholder in a railway company, filed a bill praying that a creditor of the company might be restrained from bringing an action for the recovery of his debt from the plaintiff, and praying that the directors might be restrained from joining in such action against the plaintiff, and that the directors might be declared liable to satisfy all the creditors of the company out of the assets in their hands; the Court held, upon demurrer, that, although the plaintiff might have a good defence to the action at Law, that would not prevent his proceeding in Equity likewise, and that the defendants might be compelled to use the funds in their possession to discharge the liabilities of the company, instead of making use of the action by the creditor as a screw, for the purpose of compelling payment of the debt by the plaintiff, and overruled the demurrer (3). And where a bill stated that a railway company had been formed, and one of the creditors of the company, after being paid his debts by the managing committee, had brought an action for payment of the said debt, at the instigation of the committee against the plaintiff, who was a shareholder in the company, and the bill was filed against the creditor and the members of the committee for an injunction to restrain the action and that the committee might be restrained from distri-

(1) *Holyoake v. Shrewsbury and Birmingham Railw. Co.*, 5 Railw. Cas. 421.

(2) *Cotter v. Midland Railw. Co.*,

2 Ph. 469; 5 Railw. Cas. 187.

(3) *Fernihaugh v. Loder*, 4 Railw. Cas. 473; 15 L. J. (N. S.) Ch. 458.

buting or paying away the assets in their hands, except in discharge of the liabilities of the company; a demurrer for want of equity and multifariousness was overruled; and it was also held, that the other shareholders need not be made parties to the suit (1).

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89. Where an application for an injunction to restrain an alleged breach of covenant had been once ordered to stand over until the decision of the two legal questions raised by the defendant, and on those questions being decided in the plaintiff's favour, and the motion coming on again, the defendant raised a third legal objection, and the Court below (Vice-Chancellor Sir J. Wigram), at his request, directed a case to be stated for the opinion of a Court of Law upon it; but, on the ground of the delay in bringing it forward, granted an injunction in the meantime. On appeal, however, Lord Chancellor Cottenham dissolved the injunction notwithstanding that circumstance, on the ground of the much greater facility of indemnifying the plaintiff than the defendant, according as the one or the other might succeed at Law (2). When relief in equity depends upon a legal right, the proper course is first to ascertain what the law is; and where the interference of the Court (in this case by injunction) depends upon a legal right which is disputed, the Court ought, for its own security, to put the matter into a course for ascertaining that right; and if that, under the old practice, was to be done by sending a case for the opinion of a Court of Law, this Court ought not then to have left it to the option of the defendant, but ought itself to have directed a case to be prepared, with (under the then practice) a reference to the Master to settle it in case the parties differed (3).

Injunction to restrain breach of covenant refused (here) on the ground of the greater facility of indemnifying plaintiff than defendant. When relief depends upon a legal right, the proper course is first to ascertain the law.

90. Where plaintiffs moved for an injunction to restrain the defendants from using, in a manner alleged to be illegal, a communication carried by certain branch rails from plaintiffs' to defendants' railway, and also from using certain other rails which connected a certain other railway with the defendants' station north of F., and also from using a station built by the defendants on ground purchased by them of the plaintiffs; the Court held that a Court of Equity would not interfere by injunction, but would

(1) *Lewis v. Billing*, 4 Railw. Cas. 414. *Co.*, 2 Ph. 44; 1 Coop. C. C. 3; 4 Railw. Cas. 491; 10 Jur. 488, 531.

(2) *Rigby v. Great Western Railw.*

(3) *Ib.*

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In cases of trespass under colour of title, where mischief is irreparable, the Court grants an injunction, and injunctions will be granted in all cases of trespass in which damages would be inadequate or uncertain, and complete justice can only be done by protecting the right *in specie*.

A railway company can be restrained relying on a receipt as a discharge of the plaintiffs' claim for injuries where receipt obtained by fraud.

leave the parties to their legal remedies, the plaintiffs having failed to shew that irreparable injury would result (1). But in cases of trespass, under colour of title, where the mischief apprehended is irreparable, a Court of Equity will grant an injunction, and whether the mischief be irreparable or not, it will by decree, if not by order, upon motion, extend the jurisdiction of preventive justice to all cases of trespass in which damages would be an inadequate and uncertain remedy, and the protection of the right *in specie* the only mode of doing complete justice (2).

91. Where a railway company in the course of their works caused excavations to be made on their own land, within three feet of the walls of the houses belonging to the plaintiffs, and to a depth of three feet lower than the foundations of such houses; on affidavits that the houses had been undermined and in danger of falling in, and that the lives of the occupants would not be in safety if the excavations were allowed to proceed, the plaintiffs obtained an injunction *ex parte*, restraining the company from making further excavations. On affidavits on the part of the company, stating that the excavations had not endangered, and, if proceeded with in the ordinary manner, would not endanger the houses; and that the giving way of one of the houses was owing to the wall thereof being very old and badly built, and to the taking down of an adjoining building, the Court dissolved the injunction with costs (3).

92. Where plaintiffs in an action against a railway company for compensation for injuries, filed a bill against the company for a declaration that a receipt given by them to the company for such injuries was a receipt only for £15, and not a proper satisfaction or discharge of the plaintiffs' claims; and that the company, who had pleaded to the action that the plaintiffs had received and accepted the £15 in full satisfaction and discharge of the causes of action, might be restrained from relying on their plea or setting up the payment or receipt, on the ground that the receipt was obtained by fraud on the part of the company's agents; upon a demurrer to the bill, Vice-Chancellor Sir R. T. Kindersley held,

(1) *North Union v. Bolton and Preston Railw. Co.*, 3 Railw. Cas. 345.

(3) *Warburton v. London and Blackwall Railw. Co.*, 1 Railw. Cas. 558.

(2) *Ib.*

that the fraud alleged was not such as a Court of Law could necessarily deal with, and that the plaintiffs were not precluded from coming to the Court of Chancery by reason of their having commenced the action, they not having attempted an equitable replication; and the Court overruled the demurrer, and also held that the plaintiff had rightly limited the prayer of his bill to the relief only of restraining the setting up in the action the receipt in full, and that it was no objection to the bill that the plaintiffs did not ask for compensation or other relief in Equity (1). But where a plaintiff filed a bill against a company, in which he alleged that he accepted £400, and signed a receipt, on the distinct understanding that he would not be thereby precluded from demanding further compensation if it turned out that his injuries were more serious than was supposed at that time, and the bill prayed that the company might be restrained from relying upon a plea that the plaintiff had accepted the £400 in full satisfaction and discharge of the plaintiff's claim; the Lords Justices James and Mellish held (reversing a decision of Vice-Chancellor Malins), that if the facts alleged by the plaintiff were true, they would be an answer at Law to the defendants' plea to the action; and that, therefore, the bill ought to be dismissed. A receipt is not like a release under seal; it is nothing more than an acknowledgment that the money expressed to be received has been paid, and it may always be explained by parol evidence. Lord Justice James said, "The case appears to have been considered in the Court below, and has been pressed upon us very much as if it were a case like that of *Stewart v. Great Western Railway Company* (2), in which, there being a poor man lying suffering from a railway accident, persons officiously, on behalf of the railway company, went to him and got him to accept a small and almost nominal sum, by means of false representation as to the communications which had been made about his state—a case of directly fraudulent practice upon the man, and a directly fraudulent and false statement made to him to induce him to enter into the arrangement which was there made. Under those circumstances, it appears to me it was a matter of

(1) *Stewart v. Great Western Railw.* S. 319; 13 L. J. (N. S.) 79; 13 W. R. Co., 2 Dr. & Sm. 438; 2 De G. J. & 907.

(2) *Supra.*

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course that this Court should not relinquish its jurisdiction to deal with a case of fraud of that kind, and to say that the company was not entitled to use for any purpose, or under any circumstances, the agreement which had been obtained in that way. But the present case appears to me one totally different in its circumstances. The plaintiff is a gentleman of education, a gentleman of skill, describing himself as a civil engineer, as having been engaged for many years as a civil engineer under a great railway contractor in Ireland—a man, therefore, fully capable, unless weakened by illness or accident, of taking care of himself and understanding what was done” (1).

The Court will restrain a company building in violation of a covenant, notwithstanding an Act subsequently obtained.

93. Where a railway company, in purchasing land, covenanted with the owner not to build upon it above a certain height, within a given distance from other property of the vendor, and the company afterwards obtained an Act of Parliament empowering them to widen their line; the Court held, first, that it would prevent them from building piers more than the limited height and standing within the limited distance, for the purpose of widening their line; secondly, that if the covenant was not invalid at Law as being against public policy, the Court would not be prevented from interfering on that ground, and that when the Court refuses to enforce a covenant because the damage would be inappreciable the case must be perfectly clear (2).

Where the Court refuses to enforce a covenant because the damage would be inappreciable, the case must be perfectly clear.

The Court will not grant an interlocutory injunction where the validity of the act is, as between the parties, matter of doubt, and for which there can be adequate compensation.

94. The Court will not, by an interlocutory injunction, restrain an act the validity of which, as between the parties to the suit, is matter of doubt, and for which, if wrongful, the plaintiff can obtain adequate compensation in damages at the hearing of the cause; while the injunction, if granted, would inflict serious injury on the party sought to be restrained; and this Court, on an interlocutory motion for an injunction, will act according to the justice of the case, as ascertained upon the evidence before it, and according to the comparative injury which may arise from granting or withholding the injunction. And where a contractor agreed to execute the works of a railway within a certain time, and, on being

(1) *Lee v. Lancashire and Yorkshire Railw. Co.*, 11 Jur. (N. S.) 380; L.R. 6 Ch. 527; 19 W.R. 729.

(2) *Lloyd v. London, Chatham, and* p. 91.

Dover Railw. Co., 11 Jur. (N. S.) 380; 2 De G. J. & S. 568; *v. S. C.*, ante,

paid in a certain manner, and under a condition that if he failed to proceed with the works as required by the engineer of the company the contract should be void, and the implements and materials belonging to the contractor should be forfeited; and the contractor did not satisfy the engineer of the company, and the company proceeded to take possession of the works, and the contractor alleged that the proper payments had not been made to him; the Lords Justices, affirming a decision of Vice-Chancellor Sir J. Stuart, held, that the Court would not restrain the company by interlocutory injunction until the questions between the company and the contractor were decided. But Lord Justice Knight Bruce (together with Lord Justice Turner), thought the defendants should enter into an undertaking not to remove any property belonging to the plaintiff, if it could be worded so as to do no harm (1). And where a contractor agreed to buy the lands and execute the works for a railway company, the company being empowered to take upon themselves the performance of the works, if the contractor, in the judgment of the engineer, failed in due performance, and this occurred, as the company alleged, *bonâ fide*; the Lords Justices held, that the Court would not restrain the company by interlocutory injunction until the questions between the contractor and the company were decided (2). Where a railway contractor, employed to construct the lines of several railway companies, all forming part of the same railway system, employed an engineer and paid him various sums, generally on account, and these payments were mostly made with moneys advanced by the plaintiff company to the contractor for the specific purpose of discharging their debt to the engineer, and the sums so advanced and paid were sufficient to pay the whole of that debt; but he, the engineer, however, claimed to appropriate the payments to the debts due from the other companies, and brought an action against the plaintiff company for their whole debt; a bill against the engineer, the contractor, and the other companies, for a declaration that the engineer was not at liberty so to appropriate the payments made to him, for an account, an apportionment (if necessary), of

The Court refused to restrain a company by interlocutory injunction taking possession of works upon an alleged default in a contractor.

(1) *Munro v. Wivenhoe and Brightlingsea Railw. Co.*, 11 Jur. (N. S.) 612; 13 W. R. 880.

(2) *Garrett v. Banstead and Epsom Downs Railw. Co.*, 11 Jur. (N. S.) 591.

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The Court will restrain a company from selling a contractor's plant where they have power on his default to take possession thereof, &c., unless there is a balance actually due from contractor.

the sums paid between the several companies, and an injunction against the action, is demurrable, as the question of appropriation might have been raised at Common Law; and multifarious, as the other companies are not properly parties to a suit between the company and those it employs (1). A company will be restrained by injunction from selling plant belonging to a contractor who has made default, where they have power in that case to take possession of the plant at a valuation, and to allow it in account with the contractor, and have also power to use it in the construction of the line, unless it appears that there is a balance of account actually due from the contractor. And where an agreement between a railway company and a contractor provided, that in case the contractor should be guilty of any delay or default in the fulfilment of the contract, the company might take the execution of the works out of his hand, and might use all or any of his plant, materials, &c.; and that, in addition to all other rights and remedies which the company might have against the contractor, the company might apply any moneys to which the contractor would otherwise be entitled under his contract towards satisfaction of all losses or expenses occasioned to the company by the delay, and that all the plant, &c., which at the time of such delay or default should be in or about the site of the works, should thereupon become the absolute property of the company, and be valued or sold, and the amount of such valuation or sale credited to the contractor in reduction of the moneys recoverable from him by the company; and the company took the execution of the works out of the contractor's hand under this clause, and the contractor brought an action for breach of contract, which, with all matters in difference between the parties, was referred to arbitration; the Master of the Rolls, Lord Romilly, held, that the plant and materials did not become the absolute property of the company unless loss or expense had been occasioned to them, and granted an interlocutory injunction to restrain them from removing and selling the plant and materials pending the arbitration (2). Where upon the face of a bill, seeking to enforce a contract between a contractor and a

(1) *Aberystwith and Welsh Coast Junction Railw. Co., L. R. 2 Eq. 358; Railw. Co., v. Piercy*, 2 H. & M. 713. 14 W. R. 816.

(2) *Garrett v. Salisbury and Dorset*

railway company, it appeared that a part of the consideration for such contract was a grant to the contractor of all the capital of the company, and of such sums of money as they were entitled to raise under their borrowing powers, with a further proviso, that a part of such capital so to be granted should be paid for in the form of preference shares, the creation of which both parties knew to be *ultra vires* of the existing powers of the company to create; Vice-Chancellor Sir J. Stuart held, that this was not a ground for demurrer for want of equity, observing that he could not say that many important questions might not arise in the extraordinary case set out by the bill, and that such a question as to the rights of parties to enter into those contracts was too important to decide on demurrer (1). Where a contractor, in consideration of an advance to a projected railway company, obtained from the promoters an agreement that he should have the contract to make the line, and this agreement was afterwards ratified by the company, but they subsequently gave the contract to another contractor, who had knowledge of the agreement with the first contractor; Vice-Chancellor Sir R. Malins allowed demurrers by all the defendants to a bill filed by the first contractor against the company, the promoters, and the other contractor, for specific performance of the agreement, and for an injunction to restrain the company from entering into any contract inconsistent with the agreement made with the plaintiff. The Vice-Chancellor said, the authorities made the rule quite clear, that in so complicated a matter as the construction of a railway the Court would not enforce specific performance, and that he could give no relief here without running directly counter to those authorities: that the plaintiff's proper remedy was an action for damages on the breach of contract, and if he had no binding contract to sue upon, that was his own look out (2).

There is no specific performance of an agreement for the construction of a railway.

95. Where a landowner agreed to sell lands to a railway company for a fixed sum, the company agreeing to make, for the convenience of the landlord, such crossings as his surveyor should, within one month, notify, and the surveyor did not notify any crossings until two months afterwards; the Court held, that it

If a party makes a special agreement as to crossings on a line, and allows that to fall through, he cannot

(1) *Pickering v. Ilfracombe Railw. Co.*, 15 W. R. 218.

(2) *Greenhill v. Isle of Wight (Newport Junction) Railw. Co.*, 19 W. R. 345.

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claim to have other crossings made at the discretion of the Court, nor to set up general rights under the Railway Acts to have the crossings made.

The Court refused an injunction to restrain an obstruction of a right of way, where it was doubtful whether a public right existed, and no private right was established.

would not, under the circumstances, order the company to make the crossings notified as above mentioned, or to make such crossings as were proper and necessary; and that, as the parties had agreed to leave matters to the discretion of the said surveyor, the Court had no power to substitute its own discretion for that of the surveyor, so as to order the construction of works, though such might appear to be necessary and proper (1). And where a person has made a special agreement as to crossings on a line of railway running through his land, if, from particular circumstances, that agreement is not carried into effect, he cannot, on the ground of any general rights, claim to have any other crossings made, according to the discretion of the Court, for that would be to get the Court to substitute a new agreement, not to enforce the performance of the original; nor can a person who has made a special agreement as to crossings on a line of railway, and who, from particular circumstances, allows that agreement to fall through, afterwards set up general rights under the Railway Acts to have other crossings made (2).

96. Where a railway company had obstructed an alleged public right of way, and the evidence shewed that the public right had been so dealt with that it had been lost, or that it was doubtful, upon the evidence, whether the public right of way had not been extinguished by disuse and obstruction, and did not establish a private right of way; Vice-Chancellor Sir J. Stuart refused an injunction against the company, and left the plaintiff to pursue his remedy by action on the case, under the provisions of the Railways Clauses Act, 8 Vict. c. 20 (3).

97. Where by a clause in a Railway Act, after reciting to the effect that the proposed line skirted the sea, and would obstruct the traffic between the sea and the lands on its shore, and so deprive the lands of their natural advantages of position as respected the sea, and that the lands abounded with minerals, which in some cases belonged to persons not owners of the surface, and were well situate for manufactories and other purposes of commerce, and that it was desirable to give facilities of access between the lands

(1) *Darnley v. London, Chatham, and Dover Railw. Co.*, 11 Jur. (N. S.) 520, L. J. J.; L. R. 2 H. L. 43.

(2) *Ib.*

(3) *Freeman v. Tottenham and Hainpsstead Junction Railw. Co.*, 11 Jur. (N. S.) 107; 13 W. R. 335.

and the sea, and from the sea and the lands on the seaward side of the line to parts inland, it was enacted to the effect, that owners or occupiers of any lands, manufactories, or mines, lying near or adjoining the railway, and at parts adjacent, might at any time make any railways across the railway (not crossing it on a level), and use them "for the benefit of themselves and of all and every other person and persons to whom they or any of them may from time to time give leave, and in such way and for such purposes as they or any of them may require;" and a neighbouring landowner proposed to construct a railway on his own land, and to carry it under the company's railway, and to use it as a public railway for general traffic; the Court held, that he was entitled so to do, and that the clause in the Act did not restrict the use of the cross railway to purposes connected with the more convenient enjoyment of the neighbouring lands (1).

98. Where, in pursuance of an agreement for sale to a railway company, a sum is awarded as purchase money of the land, and a further sum as compensation for damages, the vendor has a lien on the land in respect of unpaid compensation as well as purchase money, and he is entitled to enforce that right by a sale of the land (2); and an entry and payment into Court by a company under the Lands Clauses Act, s. 85, do not deprive the vendor of his lien; nor does payment of money as security, in pursuance of an agreement entered into before the price of the land is ascertained, deprive the vendor of his lien (3); and the rights of the public and of debenture creditors, and others claiming under the company, are subordinate to the vendor's lien for unpaid purchase money (4). Where the plaintiffs had been declared entitled to a lien on the lands of two companies, and default was made by one of the companies, and shortly afterwards proceedings in the suit were, by an arbitrator's award (under the powers of an Act), stayed as against the other company only; upon a petition by the plaintiffs, praying that the amount due under the above order for principal, interest, and costs, might be raised by a sale of the lands of the former company, and in the meantime for an injunction

Vendor has a lien on land for sums awarded as purchase money and compensation, in respect of compensation as well as purchase money; and entry and payment into Court do not deprive vendor of lien, nor does payment of money as security. The rights of the public and of debenture creditors, &c., claiming under company are subordinate to this lien.

(1) *Hughes v. Chester and Holyhead Buntingford Railw. Co.*, 35 Beav. 52; *Railw. Co.*, 3 De G. F. & J. 352. 14 W. R. 158.

(2) *Walker v. Ware, Hadham, and*

(3) *Ib.*

(4) *Ib.*

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and receiver, and other relief; it was held, by Vice-Chancellor Sir J. Bacon, that the Arbitration Act (the London, Chatham, and Dover Railway Arbitration Act, 1869) did not interfere with the rights of the petitioners, and the order was made as prayed (1). But although a vendor of land to a railway company, whose purchase money is unpaid, is entitled, like any ordinary vendor, to have his lien enforced by a sale of the land, he is not entitled to an injunction to restrain the company until sale from making use of the land which he had sold to them (2). In this case, a person who had sold to a railway company some land over which the railway had been made and opened, obtained a decree ordering specific performance, and declaring his lien for the balance of purchase money; the company having become insolvent, an order was made by Vice-Chancellor Sir W. M. James, on the petition of the vendor, for sale of the land and payment of the deficiency, and for an injunction restraining the company, until payment, from running any engines over, or otherwise using or continuing in possession of, the land; it was held by Lord Justice Sir G. M. Giffard, varying the order, that an injunction was not the proper form of relief, as it would make the land useless to both parties, and the order for an injunction was therefore discharged, and an order made for a receiver, with a direction to the company to give him immediate possession. When land purchased by a railway company is sold to enforce the vendor's lien for unpaid purchase money, it is sold freed and discharged from all conceivable claims on the part of the company, and from all conceivable claims on the part of the public, as claiming through the company (3).

Debentures
(here) not a
charge in the
nature of an
equitable
mortgage on
lands of com-
pany; holders
had no right
(here) to re-

99. Where a railway company in a colony, being also a land company, having had transferred to them by agreement, and an Act of Parliament confirming the same, the undertaking, and also the lands of another railway company, with power to appropriate such lands to their shareholders, issued debentures (called mortgage debentures), whereby the company, for securing an advance made to

(1) *St. Germans (Earl) v. Crystal Palace Railw. Co.*, L. R. 11 Eq. 568. 39 L. J. (Ch.) 522; 23 L. T. (N. S.) 96; L. R. 8 Eq. 653; *Keane v. Athenry*

(2) *Munns v. Isle of Wight Railw. Co.*, L. R. 5 Ch. 414; 18 W. R. 781. *and Ennis Junction Railw. Co.*, 19 W. R. 43, 318.

(3) *Ib.*

them, granted to the debenture holders their "undertaking, and all moneys to arise from the sale of the lands of the company for the time being," and all future calls and tolls, and all their engines, &c., goods and chattels, with a proviso on non-payment, for entry by the debenture holders "upon the receipt of the proceeds of sale, tolls, calls, &c.," and upon the absolute possession of the engines, &c., goods and chattels of the company, and the road and the control thereof; and with a further proviso "that nothing therein contained should be held to limit the power of sale or appropriation by the company of any of the lands of the company, nor constitute a charge upon the same;" the Privy Council, affirming the decision of the Courts below, held, first, that such debentures did not constitute a charge in the nature of an equitable mortgage on the lands of the company, so as to entitle the debenture holders to restrain the sale of such lands by judgment creditors of the company under an execution, nor give them any title to the proceeds of the lands when sold; secondly, that as judgment creditors under an execution take the precise interest, and no more, which the debtor possesses in the property seized, the sale being a sale by the law and not by the company, such judgment creditors took the lands subject to any incumbrances, legal or equitable, that they were subject to in the hands of the company (1).

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strain sale of
lands by judgment
creditors
of company,
nor any title
to proceeds of
sale of lands.

100. A railway company will not be restrained by injunction from making a deviation within its powers of deviation, if the information or bill against them does not charge them with capriciously using their powers of deviation, or with exceeding their powers; and if no evidence is given to shew that if the deviation was made the line could be constructed in any better way than that proposed by the company (2).

A railway
company will
not be re-
strained from
making a de-
viation within
its powers,
unless charged
with caprici-
ously using or
exceeding
powers.

101. Where plaintiffs filed a bill against a railway company, making two of the shareholders only defendants, but stating them to be so made as representatives of the other shareholders, and prayed an injunction against the said two shareholders as representatives of the rest, and went on to pray the same against all others the holders of certain shares of the company; Vice-

(1) *Wickham v. New Brunswick and
Canada Railw. Co.*, L. R. 1 P. C. 64;
12 Jur. (N. S.) 84.

(2) *Att.-Gen. v. Great Western
Railw. Co.*, 14 W. R. 726.

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Chancellor Sir J. Stuart, observing that there was an inaccuracy in the latter portion of the prayer, held, that it was not such an inaccuracy as would justify the Court in allowing a demurrer for want of parties (1).

The Court will direct company to give access to plaintiff filing a bill to restrain detriment by the company's works, for the purpose of inspection.

102. Where a householder filed a bill against a railway company for an injunction to restrain them from proceeding with their works to the detriment of his premises, until they should have properly entitled themselves to do so, and the company had put up such a hoarding as prevented him from inspecting the progress of the works; an order was made by Vice-Chancellor Sir W. P. Wood that the company should give access to him, his surveyors and builders, to go and view the works in the construction of the railway, carried on close to his house and premises, at all reasonable times of the day, upon his giving half an hour's notice of his desire to do so (2).

Land required for making compellable accommodation works is not superfluous land within 8 Vict. c. 18 (*v. ss.* 127, 128), and 8 Vict. c. 20 (*v. ss.* 16, 45, 68).

103. Where a railway company bought from the plaintiff a small piece of land, the whole of which, according to their original plan, would have been covered by the embankment of the railway; and being obliged to provide a communication between severed lands of another landowner, the company altered their levels so as to narrow the embankment and leave unoccupied a strip of the land purchased from the plaintiff; and this strip they turned into a road for the use of the other landowner; and the plaintiff thereupon, before the period named for the sale of superfluous lands had arrived, filed his bill to enforce a right of pre-emption as to the strip, and for an injunction to restrain the selling or disposing of the land, and from allowing it to be used as such proposed road; the Lords Justices held, reversing the decision of Vice-Chancellor Sir J. Stuart, that the land was not superfluous land, for that the making accommodation works, which the company were compellable to make, was one of the purposes of their Acts, and that the plaintiff, therefore, had no title to relief. But they held (agreeing with the Court below) that the suit was not premature, for that if the making the road had not been one of the purposes of the Acts the permanent dedication of the land to that purpose would have established the land to be superfluous land,

(1) *Pickering v. Ilfracombe Railw. Co.*, 15 W. R. 218.

(2) *Saul v. Metropolitan Railw. Co.* 16 L. T. (N. S.) 169.

so as to entitle the plaintiff at once to enforce his right of pre-emption (1).

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104. Where the justices of the peace have jurisdiction to compel the construction of accommodation works by a railway company, or to enable the landowner himself to construct them, there must be some special ground, such as contract, or that the company are exceeding or abusing their parliamentary powers, to induce the Court to interfere. Insufficiency of drainage works, such as to cause the flooding of the plaintiff's land (the railway having been constructed twenty-eight years), is not a sufficient ground for the interference of the Court; nor will it, in such a case, go into the question of the magnitude of the damage caused; so held by Vice-Chancellor Sir R. Malins, in a suit by the owner of an estate to restrain a company from permitting the water intercepted by their works from flowing over the plaintiff's land without proper channels or watercourses for carrying off the same, and for damages (2). The Vice-Chancellor, on dismissing the bill, said he thought it highly inexpedient that this Court should hold out encouragement to every vexatious and litigious landowner who has a trifling evil of this kind to complain of, and who, instead of going to the tribunal pointed out by the Legislature, should harass his opponents by a Chancery suit to do that which would be done much better by the justices, and which this Court could not satisfactorily do.

Where justices have jurisdiction to compel construction of accommodation works, the Court will not interfere unless there are special grounds, as contract, or abuse of powers—in-sufficiency of drainage, held (here) not sufficient ground.

105. Where a bill is filed at the relation of the conservators of a river to prevent interference with the water, the Court, regarding the conservators as public officers, will, *primâ facie*, accept as true their statement that the injury is important. And where a railway company proposed to take water from a river (the Cam) crossed by their line, for use at a station some distance off, to the amount of 100,000 gallons a day, and the river was only made navigable by locks, and though the flow of water was many millions of gallons daily, the supply in the river was seldom sufficient for the purposes of the navigation; Lord Chancellor Hatherley held, affirming a decision of the Master of the Rolls, that this was enough to justify the apprehensions of the conservators, and an injunction

Upon a bill by conservators of a river, the Court will, *primâ facie*, accept as true their statement that the injury is important.

(1) *Beauchamp (Earl) v. Great Western Railw. Co.*, L. R. 3 Ch. 745; 16 W. R. 241, 1155; 19 L. T. (N.S.) 189. (2) *Hood v. North-Eastern Railw. Co.*, L. R. 11 Eq. 116; 19 W. R. 266; 23 L. T. (N. S.) 433.

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was granted to restrain the defendants taking the water from the river for the use of the station (1).

When a railway company have filed a scheme of arrangement under the Railway Companies Act, 1867, and it is confirmed and enrolled, a debenture holder is not entitled to enforce a judgment obtained before filing the scheme.

106. When a railway company have filed a scheme of arrangement with their creditors under the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), and it has been confirmed by the Court and enrolled, a debenture holder, who is one of a class which is bound by the scheme, is not entitled to enforce a judgment which he obtained against the company in respect of his debenture before the filing of the scheme. The judgment is merely one of the remedies for enforcing payment of the debenture, and the debenture holder, being bound by the scheme in that character, can have no independent rights as a judgment creditor (2). The Lords Justices (affirming a decision of Vice-Chancellor Sir R. Malins, and dismissing an appeal with costs) said that the defendant, the debenture holder, was one of the class included in sect. 10 of the Act. A scheme of arrangement under the Railway Companies Act, 1867, is not, by sect. 18, made binding upon unpaid landowners or general creditors of the company, but only on persons who have assented thereto, or are members of classes which, under the previous sections of the Act, have become bound by the assent of the requisite majorities (3). The Court has, however, jurisdiction under sects. 7 and 9, to restrain proceedings by creditors or unpaid landowners during the maturing of the scheme (4). But the Court will not restrain proceedings by a creditor or unpaid landowner unless the scheme makes reasonable provision for the payment of claims of creditors and landowners (5). Notwithstanding sect. 17 of the 30 & 31 Vict. c. 127, a scheme filed under that Act, but not confirmed within three months, will, until the application for confirmation has been heard, be considered as still pending, so far as regards the protection by interim order against creditors afforded by sect. 7. But that protection will not be afforded against a suit for specific performance before decree by an unpaid landowner, except upon the terms of the company submitting to a

(1) *Att.-Gen. v. Great Eastern Railw. Co.*, 19 W. R. 788.

(2) *Potteries, Shrewsbury, and North Wales Railw. Co. v. Minor*, 19 W. R. 883; 18 W. R. 87; 21 L. T. (N. S.)

545; v. S. C. p. 189, *ante*.

(3) *Cambrian Railw. Co., In re*, L. R. 3 Ch. 278; 37 L. J. (Ch.) 409; 16 W. R. 346; 18 L. T. (N. S.) 522.

(4) *Ib.*

(5) *Ib.*

decree in the suit (1). The Railway Companies Act, 1867, s. 9, provides that after publication of notice of filing a scheme by an insolvent railway company, no process against the property of the company shall be available without leave of the Court; Vice-Chancellor Sir G. M. Giffard held, that this section enables the Court to restrain a creditor who has recovered judgment in a *scire facias* against a shareholder from issuing execution (2). When a scheme of arrangement between a railway company and their creditors had been confirmed, enrolment of the confirmation order was restrained on the application of outside creditors, who had, within thirty days from the date of the order, set down a motion for leave to file a petition for a rehearing (3). The Cambrian Railway Company's Act, 1868, sect. 36, restrains the commencement or continuance of actions and suits against the company by creditors except with leave of the Court. The Court will not in general give leave unless it is shewn that the company have money applicable to the payment and refuse to pay (4). Where a railway company was being wound up, and the contractor for the line brought an action, after the winding-up order, to recover his contract money, Vice-Chancellor Sir R. Malins held, upon sects. 87 and 163 of the Companies Act, 1862 (25 & 26 Vict. c. 89), that he had no priority over other creditors, and, upon motion, restrained the action (5).

107. Where a railway company entered into a contract for the construction of an extension of their railway, and the contractors were bound to complete the extension by the 31st of December, 1867, and until completion to pay to the directors of the company interest on so much of the extension capital as should from time to time be called and paid up; but if any delay in delivering possession of the land to the contractors should render it impracticable to complete the extension by the time appointed, such allowance was to be made to the contractors as should be equivalent to the interest payable by them for the period of the delay so occasioned;

(1) *Robertson v. Wrexham, Mold, and C. Quay Railw. Co.*, 17 W. R. 137.

(3) *Id.* L. R. 6 Eq. 615.

(2) *Devon and Somerset Railw. Co., In re*, L. R. 6 Eq. 610; 37 L. J. (Ch.) 914; 18 L. T. (N. S.) 631; 17 W. R. 133.

(4) *Parry, In re*, 18 W. R. 416; 22 L. T. (N. S.) 116.

(5) *South Eastern of Portugal Railw. Co., In re*, 17 W. R. 982.

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and the company's Acts prohibited the payment of dividends out of capital, and a subsequent Act enacted that all moneys paid by the contractors in respect of non-completion should be carried to revenue account, and be applicable to the payment of dividends on the extension capital, and the extension was not completed on the 31st of December, 1868, and accordingly the contractors paid to the directors £42,600 in respect of the half-year ending on that day; but the directors, admitting that the delay was attributable to the company's default in delivering possession of the land, had repaid, or were about to repay, this sum to the contractors out of capital; Vice-Chancellor Sir W. M. James held, that the £42,600 were not really "moneys paid by the contractors in respect of non-completion," and that to apply this sum in payment of dividends would be a violation of the statutory prohibitions against paying dividends out of capital, and the company and its directors were accordingly restrained by injunction from so applying them (1).

The Court will restrain the payment of dividends out of capital moneys, both to the extent of the difference between the net rent and conjectural income of surplus land, &c., and to the extent of the conjectural increase in value of the land.

Where a railway company were possessed of considerable surplus lands, which by Act were exempted from the operation of the Lands Clauses Consolidation Act, 1845, and of which they were empowered to hold, let, and grant leases, and it was considered unadvisable to sell until they should be further increased in value, and on two separate occasions, in the half-yearly accounts of the company, the amount available for dividend was increased by a sum in excess of the total net rental of the surplus lands to represent profit in respect of the increased value of the lands, and so as to make a fair adjustment of such profit between the present and future proprietors of shares, and a dividend to the full extent of the amount certified to be available was on each occasion declared by the general meeting, and subsequently paid; on a bill by a deferred shareholder who had not participated, praying (*inter alia*) that the defendants might be restrained from distributing by way of dividend any capital moneys of the company, either to the extent of the difference between the said net total rent and the conjectural income of the conjectural value of the said surplus land, or to the extent of the conjectural increase in value of such lands, or to any other extent whatever; Vice-Chancellor Sir

(1) *Salisbury v. Metropolitan Railw. Co.*, 38 L. J. (Ch.) 249; 20 L. T. (N. S.) 72.

W. M. James held, that such payments of dividend were breaches of trust, and that the directors were liable to refund the moneys improperly paid, with interest at 4 per cent. per annum from the respective times of payment, without prejudice to any right the directors might have to recover the moneys from the shareholders to whom they had been so paid (1).

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108. A simple contract creditor of a company (having no mortgage or other security, and not having taken out execution) cannot sustain a bill to restrain the company from dealing with their assets as they please, on the ground that they are diminishing the fund for payment of his debt (2). A shareholder in a company who seeks to restrain the company from doing an act *ultra vires* must shew, by distinct and definite averments, the illegality of the act (3). Where a company have paid for things properly chargeable to capital out of revenue, they are justified in recouping the revenue account at a subsequent time out of capital, and may, if necessary, raise fresh capital under their borrowing powers for that purpose (4).

A simple contract creditor of a company cannot restrain dealing with the assets.

109. A railway company, in 1856, took possession of a meadow, a large part of which belonged to one owner, and a small part to another, who did not know the position or the exact extent of his land. The company, in 1859, took a conveyance of the large part, on which conveyance the extent of the small part was stated. The company did not pay for the small part, and the owner, in 1868, brought an ejectment against the company, obtained judgment, and was put into possession. His possession was disturbed by the company, and he filed a bill to restrain them; thereupon the company offered to pay the value of the land as in 1856, and interest thereon, which the landowner refused. The company then (*i.e.*, in 1870) produced a notice to treat, given in 1856, and gave notice of their intention to proceed under that notice. The landowner filed a second bill to restrain them. The Lord Chancellor, Lord Hatherley, and Lord Justice James held, reversing a decision of Vice-Chancellor Malins, that under the circumstances, the company was not

The owner of a small part of land, the rest of which had been taken by a railway company, is entitled to an injunction to restrain the disturbance of his possession. Company restrained proceeding (here) on an old notice to treat.

(1) *Salisbury v. Metropolitan Railw. Co.*, 18 W. R. 974; 22 L. T. (N. S.) 839; *v. Evans v. Coventry*, 8 De G. M. & G. 835; 5 W. R. 187, 436.

(2) *Mills v. Northern Railw. of Buenos Ayres Co.*, L. R. 5 Ch. 621; 19 W. R. 171.

(3) *Ib.*

(4) *Ib.*

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entitled to proceed under the notice to treat; and that, under the circumstances, there had been no mistake or inadvertence, so as to bring the case under the Lands Clauses Act, sect. 124. And the plaintiff submitting to have the land valued, and the defendants preferring such a decree to an injunction, an inquiry was directed as to the then present value of the land, and the mesne profits for six years, and payment by the company accordingly (1). Lord Chancellor Hatherley said, that the defendants set all law at defiance, and after the plaintiff had been put into possession under the judgment in ejectment, still continued to run their trains over the land. And he said, "Of course, in such cases an injunction as to user of a railway is a serious matter. With regard to what is said as to public interests, I am not inclined to listen to any suggestion of public interest as against private rights acquired in a lawful way. I do not think that the interest of the public in using something that is provided for their convenience is to be upheld at the price of saying that property is to be confiscated for that purpose. A man who comes to this Court is entitled to have his rights ascertained and enforced, however inconvenient it may be to third persons, to whom the use of his property may be very convenient."

The interest of the public is not to be upheld at the price of saying that property is to be confiscated.

110. A person may be an adjoining owner to superfluous lands within 8 Vict. c. 18, s. 128, although he purchased such adjoining lands from the company itself. It would not be sufficient if his lands only touched the superfluous lands at a point (2). To bring lands within the exception in sect. 128, as within a town, they must be encompassed by the buildings constituting the town, and they will not be brought within the exception as "used for building purposes," merely by being marked out in plots for, and by being capable of being used for building purposes, but must be connected with building purposes (3). All adjoining proprietors have equal rights of pre-emption, and if a decree is made in favour of one only, an inquiry will still be directed whether there is any other

All adjoining proprietors of land have equal rights of pre-emption

(1) *Stretton v. Great Western and Brentford Railw. Co.*, L. R. 5 Ch. 751; 18 W. R. 1078; 23 L. T. (N. S.) 379.

(2) *London and South Western Railw. Co. v. Blackmore*, L. R. 4 H. L. 610; 39 L. J. (Ch.) 713; 23 L. T. (N. S.) 504.

(3) *Ib.*

adjoining owner who is entitled to claim (1). The right of an adjoining owner to claim pre-emption of superfluous lands arises, if within the ten years allowed by the Act the company attempts to sell such lands; and a description in their advertisements of sale of lands "as surplus lands" is sufficient to stamp the lands with the character of superfluous lands. And the existence of a boundary wall between the superfluous and adjoining lands does not deprive the adjoining owner of his right of pre-emption (2).

111. On an amalgamation of railway companies under an Act of Parliament, some of the holders of guaranteed shares in one of the original companies filed a bill complaining of certain deductions made from the receipts credited in this, the C. company's revenue account, owing to certain alleged improper charges upon traffic made by the directors of another of the amalgamated companies to the prejudice of the C. shareholders, and praying for an injunction and an account; Vice-Chancellor Sir W. M. James held, that the question being merely one of account as between two classes of shareholders, for the determination of which the Act of Parliament had provided sufficient machinery by means of arbitration, the Court would not interfere, and the bill was dismissed with costs (3); nor will the Court grant an injunction to restrain the declaration of a dividend on the ground that the dividend so to be declared was calculated upon an erroneous principle with reference to various accounts of several amalgamated lines of railway, and the profits realized, where the same principle as to the matters of account had been adopted and acted upon for several successive years, and acquiesced in by the respective shareholders (4).

112. A promise by directors to perform their services gratuitously is a mere *nudum pactum*, and does not prevent them from recovering the salaries allotted to them under a previous binding agreement (5). When a bill depends for its equity on a promise which at first was voluntary, a Court of Equity will not assume that

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under sects. 127, 128, of Lands Clauses Consolidation Act. A sale of lands as "surplus lands" stamps them as superfluous lands.

The Court will not interfere, upon a question of mere account, between different classes of shareholders, where an Act has provided the remedy of arbitration; nor where the principle in taking the accounts has been acted upon for several years and acquiesced in.

A promise by directors to perform services gratuitously is *nudum pactum*.

(1) *London and South Western Railw. Co. v. Blackmore*, L. R. 4 H. L. 610; 39 L. J. (Ch.) 713; 23 L. T. (N. S.) 504.

(2) *Ib.*

(3) *Yool v. Great Western Railw.*

Co., 39 L. J. (Ch.) 562; 18 W. R. 825; 22 L. T. (N. S.) 781.

(4) *Yool v. Great Western Railw. Co.*, 20 L. T. (N. S.) 74.

(5) *Lambert v. Northern Railway of Buenos Ayres Company*, 18 W. R. 180.

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The question of remuneration of directors is *intra vires* of a company, and the Court will not interfere.

Where a company repudiates the agency of a party who had varied the original contract to take land, the vendor is entitled to specific performance of the original contract.

third parties have acted on the faith of it in the absence of an allegation to that effect (1). The question of remuneration of directors is *intra vires* of a company, and the Court will not interfere in the matter; it is a mere matter of internal arrangement; the Vice-Chancellor, Sir R. Malins, said that the bill was an attempt to restrain a company managing its own affairs, and allowed a demurrer (2).

113. Where a landowner who had signed a subscription contract to take shares in a railway company, contracted with the company for the sale to them of land for a sum in cash, and subsequently, at the request of a person professing to act as the company's agent, agreed to vary the contract by accepting an annual rentcharge in lieu of the sum in cash, on condition of being released from all liability in respect of certain of his shares, and shortly afterwards he conveyed the lands to the company, and the conveyance purported to be made in consideration of the rentcharge, and the company took possession of the land and paid the rentcharge for seven years; and they afterwards made calls against their vendor on all the shares which he had originally agreed to take, and brought an action against him for payment; and the landowner thereupon filed a bill to restrain the action, or, in the alternative, for a specific performance of the original contract; and the company repudiated the authority of their agent to vary the contract; Vice-Chancellor Sir W. M. James held, that under these circumstances the vendor was entitled to be relieved from the conveyance he had executed, and to have specific performance of the original contract, and to have the amount due in respect of calls set off against the purchase money due to him, and to have a lien upon the lands sold for the surplus (3).

114. Where a landowner sold land to a railway company by an agreement under which the company was to pay him "£2000 to be paid in cash, or, at the option of the company, in such securities as should be agreed upon between the parties;" and the company took possession of the land, and opened their line upon it, and under the agreement they elected to give security in lieu of cash payment, and

(1) *Lambert v. Northern Railway of Buenos Ayres Company*, 18 W. R. 180.

(2) *Ib.*

(3) *Price v. Denbigh, Ruthin, and Corwen Railw. Co.*, 33 L. J. (Ch.) 461; 17 W. R. 572.

a bond was accordingly settled and given; and the company made default on the day for payment mentioned in the bond, and the landowner sued them on the bond at Law, and recovered a part of his money by a sheriff's sale; Lord Chancellor Hatherley held, affirming a decision of the Master of the Rolls, that this was not a contract to take securities instead of cash, but to take security at that time supposing it inconvenient for the company to find the cash, and that he had a lien for the balance of his purchase money, and was entitled to an injunction restraining the company from continuing in possession of the land, and to a sale in default of payment (1).

115. An unpaid vendor to a railway company may have leave to work out a decree for specific performance against the company, notwithstanding the passing of an Act of Parliament to restrain the continuance of suits without the leave of the Court (2). The Master of the Rolls, Lord Romilly, said the defendants had possession of the property and the plaintiff was clearly entitled to be paid for it.

116. Where a railway company agreed to purchase land, and they had constructed their line of railway over it, but had not paid the whole of the purchase money, and the line was worked by another company under a traffic arrangement, and the net profits were divided between the two companies, and the vendor filed a bill against both companies for specific performance, for a declaration of lien, and an injunction against both companies to restrain continuing in possession of the land, or interfering with it, and for a receiver; Vice-Chancellor Sir W. M. James held that the second company was properly made a party to the suit (3). So in *Goodford v. Stonehouse and Nailsworth Railway Company* (4), it was held by Vice-Chancellor Sir R. Malins, that a railway company working and using the line of another company, under parliamentary powers, is a proper and necessary party to a bill for specific performance filed against that other company by an unpaid vendor,

(1) *Pell v. Midland and South Wales Railw. Co.*, 17 W. R. 506; 20 L. T. (N. S.) 288; S. C. 16 W. R. 1077, *sub. nom. Pell v. Northampton v. Banbury Railw. Co.*

17 W. R. 979; 21 L. T. (N. S.) 290.

(3) *Marling v. Stonehouse and Nailsworth Railw. Co.*, 38 L. J. (Ch.) 306; 17 W. R. 484.

(4) 38 L. J. (Ch.) 307; 17 W. R. 515; 20 L. T. (N. S.) 137.

(2) *Griffith v. Cambrian Railw. Co.*,

A company working a line of another company under a traffic arrangement, is a proper party to a bill against the latter company for specific performance of agreement to purchase lands.

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and must bear its own costs of the suit. So in *Drax v. Somerset and Dorset Railway Company* (1), in a suit for specific performance of an agreement entered into between the plaintiff and a railway company for the purchase of land belonging to the plaintiff, two holders of mortgage debentures on the undertaking of the company (who had in a suit instituted by them on behalf of themselves and all other mortgagees of the undertaking of the company, obtained an account and the appointment of a receiver,) were made parties; it was held by the Master of the Rolls, following *Winchester (Bishop) v. Mid Hants Railway Company* (2) that they were properly made parties, and their costs were directed to be added to their securities.

117. The grantee of a rentcharge, in consideration of land sold by him to a railway company, is entitled to distrain for arrears of his rentcharge upon the land so sold by him, notwithstanding the appointment of a receiver of the tolls of the company, but will not be permitted to distrain on the rolling stock or chattels conveyed by the company to trustees for the benefit of all their creditors (3).

118. Where a demurrer had been allowed to a bill filed by a company to stay proceedings at Law threatened by the defendants for the amount of their claim for lands taken by the company, if a warrant were not issued to have the amount of compensation determined by a jury under the Lands Clauses Consolidation Act, s. 68, the defendants treating an award made for that purpose as having failed; the Lord Chancellor (who affirmed the decision of the Master of the Rolls) having in his judgment intimated that an application might still be made to enlarge the time for making the award; upon a motion to extend the time, and for an injunction to stay the action, Vice-Chancellor Sir W. M. James held, that the power given to the Court by the 17 & 18 Vict. c. 125 (Common Law Procedure Act, 1854), s. 8, to remit matters referred under that Act to the reconsideration of the arbitrator, applies also to matters referred under the Lands Clauses Act; so also the power given by s. 15 to enlarge the time for making the award, even

Matters referred under the Lands Clauses Consolidation Act, can be remitted for reconsideration, and there is power to enlarge the time for making the award.

(1) 38 L. J. (Ch.) 232; 19 L. T. (N. S.) 626.

(2) L. R. 5 Eq. 17; 17 L. T. (N. S.) 161; 37 L. J. (Ch.) 64.

(3) *Eyton v. Denbigh, Ruthin, and Corwen Railw. Co.*, *Rickman v. Johns*, L. R. 6 Eq. 488; 16 W. R. 928; 38 L. J. (Ch.) 74; v. S. C. p. 4, *ante*.

after the proper time has expired (1). When the Court refers a matter back to an umpire, who has made an award, for reconsideration, that award is avoided altogether (2). And (*per* Lord Romilly) such reference back of an award of the value of land under the Lands Clauses Act operates as an original reference to the umpire, so that, by virtue of sect. 23, if no proceedings are taken on it for three months, the price is to be determined by a jury. But (*per* Lord Chancellor Hatherley), when an award has been made a rule of Court it comes within the Common Law Procedure Act, 1854, s. 15, and therefore, if it is referred back by the Court for redetermination, and no new award is made within three months, it is still in the discretion of the Court, under that Act, to allow or not, an enlargement of the term for redetermination by the arbitrator (3).

119. Where the directors of a railway company, whose borrowing powers had been fully exercised, procured advances from a bank on their own personal security, and the moneys so advanced were within the limit of the capital of the company, and were applied in the payment of contractors, or otherwise in completion of the undertaking, and the directors subsequently paid off the amount due to the bank, and the railway company at a general meeting sanctioned these proceedings; the Court held—upon a cause petition praying a declaration that the petitioners, holders of preference shares, were entitled to dividends in priority to the directors, and for an injunction to restrain the respondent company from making any payment to the directors until after satisfying the petitioners' claims—that the directors were entitled to be repaid the amount so paid by them, with interest, out of the profits of the company, in priority to preference shareholders (4); and forfeited and unissued shares of the company being entered in the names of the same directors in the register of shareholders; the Court held, that it was competent for them to shew that they held such shares as collateral security for the sums advanced by them (5).

Directors (here) entitled to be repaid amount paid by them, with interest, in completion of the undertaking, in priority to preference shareholders.

120. A mortgagee of the undertaking of a railway under a debenture

(1) *Dare Valley Railw. Co. v. Rhys*, 17 W. R. 550; 20 L. T. (N.S.) 717; 38 L. J. (Ch.) 417.

(2) *Ib.*

(3) *Ib.*

(4) *Ulster Railw. Co. v. Banbridge, Lisburn, and Belfast Railw. Co.*, 2 Ir. Rep. Eq. 190; 18 L. T. (N. S.) 91; 16 W. R. 598.

(5) *Ib.*

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ture has a title prior to that of a subsequent judgment creditor who has obtained an *elegit*, and if his security is in danger of being impaired by the acts of such judgment creditor, he may file a bill to protect his security, although the time fixed for the payment of the debenture-holder has not arrived (1); so held by Lord Chancellor Chelmsford, affirming a decision of Vice-Chancellor Sir R. Malins, who had overruled a demurrer by the *elegit* creditor to a bill by a mortgage creditor under debenture on behalf of himself and all other mortgagees of the undertaking, praying (*inter alia*) an injunction to restrain the *elegit* creditor from taking proceedings under the *elegit*.

The Court granted an interlocutory injunction to restrain the declaration of a dividend depending on the questions whether interest on debentures (here) could be charged on capital, and interest of extension capital paid out of money received from contractors.

121. Where a railway company, whose original line was constructed and at work, obtained powers and money for the construction of an extension line, the shareholders in which were not to have more than 6 per cent. for the first three years, and afterwards were to have their shares amalgamated with the ordinary stock of the company; and the directors had in former half-years charged to capital one-half of the office expenses, and also a sum representing interest on debentures issued for lines in construction; and they had also paid interest on the extension share capital out of a sum of money paid by contractors as interest in respect of unfinished lines; and a dividend on the ordinary stock had been declared accordingly; it was held, by Vice-Chancellor Sir W. P. Wood, on the application of a holder of shares in the extension line, that the directors were wrong in all these charges, and that an interlocutory injunction must issue to restrain them from declaring a dividend calculated accordingly; but it was held, by Lord Chancellor Chelmsford, on appeal, that whether the half of the office expenses was or was not rightly charged to capital, no interlocutory injunction could be granted on that ground, inasmuch as the balance carried over to the next half-year on the revenue account was much larger than the sum so charged; but that it was doubtful whether interest on debentures issued for lines in construction could be charged to capital; and that it was doubtful whether it was right to pay interest on the extension capital out of the money received from the contractors; and that the questions were not concluded by the certificate of the auditors under 30 & 31 Vict.

(1) *Wildy v. Mid-Hants Railw. Co.*, 16 W. R. 409; 18 L. T. (N. S.) 73.

c. 127 (The Railway Companies Act, 1867), s. 30: that these were not merely matters of internal management, and that the Court would interfere in such cases if the directors were acting *ultra vires*; that the questions were of such importance and doubt that the injunction must be continued till the hearing; and though the plaintiff had bought his shares a short time before the bill was filed, and to enable him to file the bill, yet it was held that he was not for that reason, or for the reason that these charges had been acquiesced in by the shareholders on former occasions, prevented from obtaining an interlocutory injunction (1). Where a railway company had power to raise additional capital by the issue of shares, and to allot to them a preferential dividend, it being enacted that dividends should not be paid out of any moneys received for the shares, and that no share should be issued until one fifth of the amount had been paid; and the revenue of the company during a particular half-year was sufficient to pay a dividend, after providing for all charges properly payable out of revenue, but, owing to the refusal of creditors of the company to give time, the revenue was absorbed in payment of sums properly chargeable to capital; and in these circumstances the company, in general meeting, sanctioned a plan for offering to each shareholder, at par, preference shares to an amount equal to the dividend which would have been payable to him if the revenue had not been diverted for capital purposes; and these shares were saleable, but only at a considerable discount; and a shareholder filed his bill, on behalf of himself and the section of shareholders to which he belonged, to restrain the issue of shares for the above purpose, to have those already issued cancelled, and to restrain the payment of dividends on them; Lords Justices Cairns and Rolt held, affirming a decision of Vice-Chancellor Sir W. P. Wood—who had overruled a demurrer to the bill, and granted an injunction restraining the company from issuing shares or stock in payment of dividends, with liberty to apply, in case a dividend should be declared on any shares or stock which had already been issued for that purpose—that the scheme was *ultra vires*; for, assuming that the shares could lawfully be issued at a discount (an issue under this scheme

(1) *Bloxam v. Metropolitan Railw.*, 17 L. T. (N. S.) 637; 18 L. T. (N. S.) Co., L. R. 3 Ch. 337; 16 W. R. 490; 41.

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being in reality an issue at a discount), and assuming that owing to the diversion of the revenue to capital purposes they could lawfully be treated as assets for payment of a dividend, each shareholder who was not willing to accept an allotment of them *in specie* had a right to insist that the proceeds of the whole should be applied rateably in payment of a dividend to all the shareholders (1). An individual member of a corporation may maintain a bill in his own name, without suing on behalf of other persons as well as himself, to restrain the corporation doing an act which is *ultra vires* (2); and it was held, that those shareholders who had accepted the shares offered to them according to the above scheme were sufficiently represented, for the purpose of these proceedings, by one of the directors who had accepted such shares, and had them registered in his name; but Lord Justice Cairns said he apprehended that before the Court would do anything in the way of granting an injunction, or any other relief, it would be most careful that nothing in the injunction or relief should affect the rights of any of the absent holders of the stock (3).

The entry by a railway company on land for purpose of diverting over it a public way which ran over lands in their occupation, is an entry within sect. 84 of Lands Clauses Consolidation Act.

122. The entry by a railway company on land for the purpose of diverting over it a public way which ran over lands already in the occupation of the company, is an entry with a view to the permanent user of the land within the meaning of the Lands Clauses Act, s. 84, and no entry for such purpose is lawful, except on payment of the proper purchase money (4). Where an agreement between a railway company and landowner provided that in case the company should require additional land for the purposes of their railway and works, they should pay for it at the rate of £200 per acre, without further payment in respect of severance or other damages; the Court held, that the company was thereby authorized to take land for the purpose of diverting a footway, within the time for completing their works, which had not expired, although the time for compulsory taking of land had expired (5).

123. Where a lessee of lands taken by a railway company

(1) *Hoole v. Great Western Railw. Co.*, L. R. 3 Ch. 262; 16 W. R. 260; 17 L. T. (N. S.) 153.

(2) *Ib.*

(3) *Ib.*

(4) *Rangeley v. Midland Railw. Co.*, 37 L. J. (Ch.) 313; L. R. 3 Ch. 306; 16 W. R. 547; 18 L. T. (N. S.) 69.

(5) *Ib.*

without notice to treat, filed a bill against the company for an injunction to restrain them from taking more land, and an assessment of damages, eight months after the company had entered upon his land; and pending the proceedings, the necessity for an injunction ceased, and the lessee did not apply for one; Vice-Chancellor Sir J. Stuart held, that inasmuch as his right to an injunction and damages was clear at the time of filing his bill, he was entitled at the hearing to an inquiry as to damages and a direction that the company should pay the sum assessed with costs (1).

124. In a suit for an injunction to restrain the London, Brighton, and South Coast Railway Company from selling or disposing of a piece of superfluous land acquired by their predecessors in title under the West London and Crystal Palace Railway Company Act, 1853, with which the Lands Clauses Consolidation Act, 1845, was incorporated, and not required for the purposes of the railway, except to the person or persons entitled to the lands (if any) from which it was originally severed, until they should have offered it for sale to the plaintiffs, as the owners of adjoining lands; the Master of the Rolls, Lord Romilly, having granted an injunction restraining the sale, held, that the right of pre-emption given by sect. 128 of the Lands Clauses Consolidation Act to persons whose lands immediately adjoin superfluous land proposed to be sold by the promoters of the undertaking, extends to lessees for years of such adjoining lands; and held that lessees of lands separated from such superfluous land by a private road, of which they had the exclusive right of user during their tenancies, the ownership of the soil being in their reversioner, were owners of "immediately adjoining land" within the same section; and that the words in the 128th section of the Lands Clauses Consolidation Act, "lands used for building purposes," mean lands sold as building land, or let on building leases, and actually laid out for building at the time of their being taken by the railway (2). And where several persons are owners of lands adjoining a piece of surplus land all in one piece, such of them as elect to exercise that

The right of pre-emption given by sect. 128 of Lands Clauses Consolidation Act extends to lessees.

(1) *McRae v. London, Brighton, and South Coast Railw. Co.*, 18 L. T. (N.S.) 226. *and South Coast Railw. Co.*, L. R. 5 Eq. 104; 37 L. J. (Ch.) 90; 16 W. R. 267; 17 L. T. (N.S.) 368.

(2) *Coventry v. London, Brighton,*

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right, are entitled to pre-emption over the whole before any part of it can be sold to a stranger (1). But lands advertised for sale for building, or merely nitched or staked out for building purposes, are not lands used for building purposes within the exceptions of sect. 128 of the Lands Clauses Act, 1845, as lands within a town, or built upon or used for building purposes, so as to defeat the right of pre-emption of an adjoining owner. And an adjoining owner's right is not defeated, though his lands only adjoin at a point, or though his adjoining lands were purchased from the company against whom he claims (2).

125. Where the prospectus of a railway company, issued after its incorporation, stated the capital as £255,000, in 5100 provisional scrip certificates to bearer, of £50 each, £1 to be paid on application, and £4 on allotment, and that "on registration of the scrip, of which due notice will be given, the certificates for £50 will be divided into five shares of £10 each;" and on the application of A. scrip certificates were allotted to him, which he shortly afterwards, without taking any steps to convert them into shares, sold in the market, and these scrip certificates, together with many others which had been in like manner parted with by their allottees, were repurchased on behalf of the company by agents of the directors, and more than two years afterwards were entered upon the register as shares (each scrip certificate representing five shares) in the names of A. and other allottees; it was held by Vice-Chancellor Sir G. M. Giffard—upon a bill praying that the plaintiff's name as a shareholder might be erased from the share register of the company, and that the company might be restrained from inserting or continuing his name as a shareholder on the share register book, or in any other books of the company, and from making any return in which his name should be inserted or mentioned as such shareholder, and from publishing or holding out, or in any way treating or using his name as such shareholder, and from commencing or prosecuting any action or proceeding against him for payment of the sum of £1800, or any other sum, as calls made upon him as

(1) *Coventry v. London, Brighton, and South Coast Railw. Co.*, L. R. 5 Eq. 104; 37 L. J. (Ch.) 90; 16 W. R. 267; 17 L. T. (N. S.) 368.

(2) *Blackmore v. London and South-Western Railw. Co.*, 16 W. R. 1105; 38 L. J. (Ch.) 19; 19 L. T. (N. S.) 4.

such shareholder or otherwise against him as shareholder in the company, and also asking for damages—that A. was under no obligations to convert the scrip certificates into shares, and that, on selling them in the market, as he was entitled to do under the terms of this contract, he was relieved from all liability, and could not be retained on the register as the holder of the shares represented by these scrip certificates (1).

126. A railway company has no power to expend its funds in the prosecution of a suit not instituted by itself, and a Court of Equity will, at the instance of a shareholder, restrain it from doing so without going into the question whether or not the suit is proper or for the benefit of the company (2).

A railway company has no power to expend its funds in the prosecution of a suit not instituted by itself.

127. The A. and B. railroad, incorporated to run a road from A. to B. (U.S.) was sold under a mortgage, and the stockholders organized as a corporation under the old charter and name; afterwards a new company was chartered, to continue the road, called the B. and A. railroad company; the two companies then formed one organization, and the legislature authorized the latter to buy out the former, and then to assume the name of the Central Railroad Company of New Jersey, the plaintiffs, which should be liable for all corporate debts contracted since foreclosure of the mortgage; the defendant brought an action against the A. and B. company for a debt prior to foreclosure, serving a summons on C. the president of both companies; and the plaintiffs bring their bill to enjoin such suit, alleging that from the manner in which it was brought, and under the circumstances, they could not know which company was intended to be served; held, an action was maintainable against the first corporation but not against the plaintiffs, and they had a right to be informed which company was intended to be sued; and, the answer not disclaiming an intention of holding the plaintiffs liable, the injunction should be continued until their liability should be shewn (3).

128. The charter of the plaintiffs, a railroad corporation, provided, that no other railroad should be authorized for thirty years, from

(1) *Eustace v. Dublin Trunk Connecting Railw. Co.*, L. R. 6 Eq. 182; 37 L. J. (Ch.) 716; 18 L. T. (N. S.) 678; 16 W. R. 1110.

(2) *Kernaghan v. Williams*, L. R. 6 Eq. 228.

(3) *Central, &c. v. Bunn*, 3 Stockt. 336 (Amr.)

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Boston, Charlestown, or Cambridge, (U.S.) to Lowell, or to any point within five miles of the northern terminus of the plaintiffs' road. The defendants, other corporations, so connected their roads as to make a continuous line from Boston to Lowell by way of Salem and Lawrence. Upon an application for an injunction, it was held, whether the legislature might or might not have constitutionally chartered a new road directly from Boston to Lowell they had not done so, and the defendants' proceedings were a virtual infringement of the plaintiff's charter, without legislative authority therefor; and a perpetual injunction was granted (1).

129. Where the highway commissioners (U.S) on petition of the defendant, had laid out and recorded a private way from his land across the ropes and fixtures of the inclined plane of a railway, an injunction was granted to restrain the doing so (2).

Obstructions to public navigation which can only be removed at great expense will be restrained until the proper position is determined.

130. Where obstructions to public navigation are about to be erected, and after erection can be removed only at great expense an injunction may be decreed. Thus a railroad company, authorized to erect a bridge over a navigable stream in such a way as "to do the least possible injury to navigation," who are about to construct it in a place where the evidence tends to shew that more injury would be done to navigation than in others, may be restrained until the question whether that is the proper position can be determined (3).

131. A railroad company alleging a right of way over a certain strip of land, and that the defendant is about to erect a flouring mill so near their track as not to leave sufficient room for its repair and construction, may have an injunction to restrain the erection of the mill (4).

A railroad company will be restrained constructing their line until they have complied with the conditions of their

132. Where a railroad company was directed by the charter to locate its road, and deposit a survey in the office of secretary of the state (U.S.), and when that should be done it might construct the road, subject to compensation for land and materials taken, to be decided on by commissioners appointed by a judge of the Supreme

(1) *Boston, &c. v. Salem, &c.*, 2 Gray, 1; see *Enfield, &c. v. Hartford, &c.*, 17 Conn. 40; *Mohawk, &c. v. The Utica, &c.*, 6 Paige, 554 (Amr.)

(2) *Mohawk, &c. v. Archer*, 6 Paige, 83 (Amr.)

(3) *Att.-Gen. v. Hudson*, 1 Stockt. 526 (Amr.)

(4) *Cunningham v. Rome, &c.* 27 Geo. 499 (Amr.)

Court on application of the corporation, when the owners could not agree with the corporation; and the corporation proceeded to construct their road through lands of an individual without his assent, and without performing either of the above conditions; it was held, they should be enjoined until those conditions were complied with (1). So in Maryland (U.S.), under the constitution, Art 3, § 46, it is sufficient ground to enjoin a railroad from entering upon land, that they have not paid or secured the damages. An averment of irreparable injury is unnecessary (2).

133. Where a railroad company altered its roadbed so as to lay it across land of the plaintiff, induced thereto by his request, and his promise to give them the right of way, which was not binding at Law, nor such as would support a suit for specific performance; it was held that he could not enjoin the company from using their new track until they had made him compensation for the land taken (3).

134. A railroad (U.S.) may be enjoined from taking up the rails upon a part of its road where the public will be thereby incommoded, driven to a more circuitous route, and compelled to tranship freight, without any object of public interest or accommodation; while the defendants will not be materially prejudiced by the injunction (4).

135. An injunction lies against an attachment by judgment creditors of a railroad of its revenues, pledged for the payment of outstanding bonds (5).

136. An injunction will not be granted to a stockholder merely because the construction of authorized branches will diminish his dividends, or the means of the company (6).

137. In Ohio (U.S.) it is held, that, admitting that the legislature is constitutionally incompetent to authorize a railroad company to embark in new enterprises entirely beyond the scope and outside of the objects contemplated by its charter at the time the stock was subscribed for, and thus to effectuate a fundamental change in its charter without the consent of all its stockholders; it is quite

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charter, and from entering lands, if they have not paid or secured the damages.

A company will not be restrained using a track it has been induced to lay down by the plaintiff.

Railroad company may be restrained taking up rails upon a part of its road.

(1) *Bonaparte v. Camden, &c.*,
Baldw. 205 (Amr.)

(4) *People v. Albany, &c.*, 37 Barb.
216 (Amr.)

(2) *Western, &c. v. Owings*, 15 Md.
199 (Amr.)

(5) *Dunham v. Izett*, 15 Iowa, 284
(Amr.)

(3) *Pettibone v. La Crosse, &c.*, 14
Wis. 443 (Amr.)

(6) *Newhall v. Chicago, &c.*, 14 Ill.
273 (Amr.)

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clear that before a stockholder can have an injunction against such proceedings he must have shewn himself prompt and vigilant in the assertion of his rights, and not wait until the mischief of which he complains is accomplished (1).

138. Where there were two sets of bondholders, secured by separate mortgages, one of the second set was enjoined from collecting his bond by execution, the property being insufficient for all; upon the ground that such sale would interfere with the priority of the other set, and the *pro ratâ* rights of the other members of the second set (2).

139. The insolvency of a railroad (U.S.) is no ground of injunction against the collection of subscriptions (3); but where there are sundry *fi fas.* against an insolvent railroad, threatening to seize and sell the road, with its equipments, extending 100 miles in length, through six different counties (U.S.), Equity will take jurisdiction, direct a sale of the entire property for the benefit of all concerned, and distribute the fund according to the practice and usage in Chancery in a creditors' suit against executors and administrators. In such a case no other Court possesses adequate jurisdiction to reach and dispose of the entire merits. Any creditor who has a claim upon the fund, but who is not a nominal party to the suit, may make himself a party thereto, in fact, by coming in and presenting his claim under the decree, and submitting himself to the jurisdiction of the Court for its settlement and adjustment upon the fund to be distributed. If he neglects or refuses to come in and entitle himself to the benefit of the decree, Equity will not assist him to set aside and annul it (4).

SECT. 2. *Estuary, Dock, Waterworks, Canal, and Pier Companies.*

CLAUSE 1.

Estuary Companies.

1. Where an estuary company as by its Act, with which the Lands Clauses and Companies Clauses Consolidation Acts, 1845,

(1) *Chapman v. Railroads*, 6 Ohio (N. S.) 119 (Amr.)

(3) *Dill v. Wabash, &c.*, 21 Ill. 91 (Amr.)

(2) *Pennock v. Coe*, 23 How. 117 (Amr.)

(4) *Macon, &c. v. Parker*, 9 Geo. 377 (Amr.)

were incorporated (but not the Railways Clauses Consolidation Act), empowered to make and maintain certain cuts and works, and to enter upon, take, and use such of the lands delineated in the deposited plans as might be necessary for that purpose, the Lords Justices, affirming a decision of Vice-Chancellor Sir W. P. Wood, held that the company was not entitled to take compulsorily land which was required not for the site of the cuts or works, but to supply materials for the execution of works on other land (1).

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CLAUSE 2.

Dock Companies.

2. Where tenants held a piece of ground, at a yearly rent, under an agreement in writing, and the rent was payable half-yearly, at Lady Day and Michaelmas Day, no term being mentioned, but the tenancy was to be determinable by six months' notice on either side; and it was provided that in case the tenants erected any buildings on the piece of ground, they were to have the privilege of removing them at any time during their occupation, or otherwise, and that they were to be allowed a beneficial interest in the same to the amount of the sum expended in the erection of buildings, such beneficial interest to extend over a period of twenty years from the date thereof, that is to say, if they were required to give up possession before the expiration of the term they were to be allowed one-twentieth part of the amount expended for each remaining year of the unexpired term; and they erected buildings on the land; and a dock company having purchased the freehold from the landlord, "subject, nevertheless, to the tenants' rights," served the tenants with a notice to quit, and after the expiration of the notice took forcible possession of the premises, without having given the tenants notice to treat for their interest therein, or deposited the value of such interest, and commenced pulling down the buildings that had been erected, without offering to pay the proportion of the money expended by the tenants on the buildings; upon a bill by the tenants to restrain the company from taking or keeping possession of the premises until they should have properly entitled themselves thereto, Vice-Chancellor Sir W. P. Wood held, that

(1) *Bentinck v. Norfolk Estuary Company*, 8 De G. M. & G. 714; 3 Jur. (N. S.) 204, 345.

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notwithstanding the determination of the tenancy by the notice, the tenants had such a beneficial interest in, and lien under the agreement upon, the land, as constituted them "owners," within the interpretation clause of the Lands Clauses Consolidation Act (8 Vict. c. 18), and entitled them to an injunction to restrain the company from entering upon, removing, or otherwise dealing with the lands until that interest and lien had been satisfied, as provided by sect. 84; and this decision was substantially affirmed by Lord Chancellor Westbury, except that the Lord Chancellor said that holding as he did that the plaintiff had no other claim than to have his lien ascertained and provided for, unquestionably he should not interpose against the dock company further than to the extent of having that interest properly provided for, and the amount of it ascertained, if the parties differed in their contention upon that subject (1). Where a bill for forming a dock company passed the House of Commons before three-fourths of the capital was subscribed, and, in order to satisfy the Standing Orders of the House of Lords, by which a bill of this sort could not be brought in until three-fourths of the capital had been actually subscribed for, certain of the subscribers subscribed for additional shares enough to make up the deficiency, and afterwards signed a memorandum to the effect that they were trustees for the company of these additional shares; and the plaintiff's bill further alleged that the directors, by whom the call had been made, were not duly appointed, as having been elected at meetings composed in great part of the holders of these additional shares, and which without them would not have been competent in point of number, but that the plaintiffs in Equity were precluded from availing themselves of this as a defence to the action, by a clause in the Act which provided that it should not be necessary, in such an action to prove the appointment of the directors, or any other matter, except the making of the calls; Vice-Chancellor Sir L. Shadwell allowed a demurrer for want of equity to the bill. The Vice-Chancellor said, supposing the meetings were not duly constituted, and that consequently the directors were not duly elected, and the call sought to be enforced was not made by proper authority; those circumstances did not entitle the

(1) *Rogers v. Hull Dock Company*, 12 W. R. 1101; 13 W. R. 217; 34 L. J. (Ch.) 165; 10 Jur. (N. S.) 1245.

plaintiff to file a bill in Equity to restrain the action, but formed the grounds upon which he ought to rest his defence to the action in a Court of Law; and that it never had been the course of this Court to restrain an action merely because the plaintiff at Law could not make out his case; and that it would be presumptuous for this Court, under the circumstances represented here, to say that *ab origine* the subscriptions were altogether false and fraudulent, and that the House of Lords allowed themselves to be entrapped into passing the bill (1). Where a public board are entitled to levy rates and duties, and if their income falls below a specified amount to have the deficiency made up out of the profits of a company, the board are sufficiently impressed with the character of trustees to enable the company to maintain a suit for an account against the board; and upon instituting such a suit to obtain declarations (*inter alia*) that the deficiency of income which they were bound to make good was one of gross, not of net income, and that, in estimating the amount of such income (whether gross or net) the defendants were bound to give credit for any sums which their predecessors, the commissioners, had, or, but for wilful default, might have received for quay duties; Vice-Chancellor Sir J. Bacon restrained the board until the hearing of the cause from prosecuting an action commenced by them against the company for arrears in respect of alleged deficiencies in past years (2).

CLAUSE 3.

Waterworks Companies.

3. A public company taking land under compulsory powers is bound to give the landowner precise information of the quantity of land to be taken and the way in which it is to be used, and must distinctly prove the existence of the powers it claims to exercise; and where any doubt arises as to the extent of the power conferred by the Legislature, the Court will construe in the way most beneficial to the landowner (3). In this case Vice-
any doubt arises as to extent of powers, Court construes most beneficially for the owner.

(1) *Mangles v. Grand Collier Dock Company*, 10 Sim. 519; 9 L. J. (N. S.) Ch. 177; 4 Jur. 333. 19 W. R. 201; v. S. C., ante, p. 489, pl. 15.

(2) *Southampton Dock Company v. Southampton Harbour and Pier Board*, 34 L. J. (Ch.) 380; 11 Jur. (N. S.) 453. (3) *Simpson v. South Staffordshire Waterworks Company*, 13 W. R. 131;

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Chancellor Sir J. Stuart held, in the Court below, that a waterworks company authorized to take land by an Act which incorporated the Waterworks Clauses Consolidation Act, 1847, 10 & 11 Vict. c. 17 (together with the Lands Clauses Consolidation Acts, 1845, 1860) might erect works upon those lands not indicated upon their deposited plans for the purpose of obtaining water from the springs beneath the surface of the land. The company proposed to construct an aqueduct by means of a tunnel through a field, and, before applying to Parliament, deposited plans (which gave no indications of surface works) shewing that a certain field would be affected by a tunnel passing forty-five feet below the surface, and gave a notice to the owner accordingly, and the company obtained its Act authorizing it to construct its works according to the plans; and afterwards proposed to take the field, and sink a well to obtain additional water from the springs beneath the field, and to erect pumping engines and other works on the surface; but upon appeal, Lord Chancellor Westbury held, that the company was not authorized by the exercise of its compulsory powers to construct such additional works, nor to take or use the field for any other purpose than that indicated on the deposited plans, and other than so much as was required for the tunnel; and that, save for the temporary purpose of construction, their power over the land was limited to making a tunnel in conformity with such plans; the Lord Chancellor said, that he entirely concurred in the rule laid down by Lord Cottenham with regard to railway and other works of a similar description (1) that it was incumbent on the company to prove clearly and distinctly from their Act of Parliament the existence of the power they claimed a right to exercise; and if there was any doubt with regard to the extent of the power claimed by them, that doubt undoubtedly should be for the benefit of the landowner, and the 10 & 11 Vict. c. 17, s. 12, the Waterworks Clauses Act, and the Act of 1863, do not empower a company to execute any works which are not authorized by the special Act of such company. A waterworks company having an Act for supplying with water the town and port of C., and the neighbourhood thereof, with the usual powers (the word

(1) (Presumably in *Webb v. Manchester and Leeds Railw. Co.*, 4 My. & Cr. 116, 120.)

“port” being construed to be used in its popular sense, and not extending to the district fixed by the commissioners of the Treasury as the port of C. for the purposes of the customs duties) proceeding to lay down pipes, which they alleged were necessary for the supply of C.; but which they admitted they intended to use for the purpose of carrying water beyond the limits of their powers, was, at the suit of the board of health of C., restrained by Vice-Chancellor Sir W. P. Wood from laying down pipes under the streets of C. for the purpose of supplying with water any parish or place not being part of the port of C., or any parish or place within or adjoining such town (1). The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), extended by the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93) places the taking of streams upon the same footing as the taking of lands under the Lands Clauses Consolidation Act; and the Master of the Rolls restrained a waterworks company from diverting a stream belonging to the plaintiff without first paying compensation for the same, or making deposit and giving a bond in accordance with the provisions of the Lands Clauses Consolidation Act (2). Where A., an owner in fee of land to which a right of running water was appurtenant, agreed with a water company to accept £2500 as compensation for his right in the water; and subsequently let the company into possession of the water; and the land was subject to a chief rent, and the owner of the chief rent also claimed from the company compensation for the loss of the water; and the company refused to pay the £2500 to A. unless he obtained the concurrence of the owner of the rent in the deed of conveyance; and A. then brought an action for the £2500; and the company filed a bill against A. alone, for specific performance of his agreement for the sale of his rights in the water, and for an injunction to restrain the action; the Lord Chancellor, affirming a decision of Vice-Chancellor Sir R. T. Kindersley, held, that the company was entitled to the injunction until further order or the hearing of the cause on bringing the money into Court to abide the decision of the conflicting claims for compensation (3). Persons obtaining from the Legislature powers

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The Waterworks Clauses Act, 1847, places taking of streams upon same footing as taking lands under the Lands Clauses Consolidation Act—diverting stream restrained until compensation, &c.

Persons obtaining

(1) *Cardiff (Mayor, &c.) v. Cardiff Waterworks Co.*, 5 Jur. (N. S.) 953. (2) *Ferrand v. Bradford (Mayor, &c.)*, 2 Jur. (N. S.) 175.

(3) *Stockport District Waterworks Company v. Jowett*, 13 W. R. 977.

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from the
Legislature
powers to
interfere with
rights of prop-
erty are
bound strictly
to adhere to
the powers.

to interfere with the rights of property for their own purposes (whether of a local nature or merely private) are bound strictly to adhere to the powers so conceded to them—to do no more than the Legislature has sanctioned, and to proceed only in the mode in which the Legislature has pointed out; but (except in a proceeding at the instance of the Attorney-General) any one seeking the assistance of a Court of Equity by way of injunction is bound to shew that he has an interest in preventing the defendants from doing what is in fact, or may well be called, a violation of their contract with the Legislature, he must shew not only that the defendants are committing, or intend to commit, a wrong, but also that the wrong complained of does occasion, or will occasion, loss or damage to himself; that he has a special or private interest in confining the defendants within the limits of their parliamentary powers. Therefore, where a Waterworks Act empowered a company to divert the water of a stream (without limit as to quantity) by means of an open channel filled with loose stones, and they were diverting it by means of a culvert; the Lords Justices held, that another company who were entitled to the water of a stream into which the diverted stream had flowed were not entitled to an injunction to restrain the violation of the terms of the Act as to the mode of diversion (1). A Court of Equity will not, at the instance of a shareholder, restrain a joint stock company (*qua* corporate body) incorporated by Acts of Parliament which prescribe its constitution and objects from applying in its corporate capacity to Parliament, and from using its corporate seal and resources to obtain the sanction of the Legislature to the remodelling of its constitution, or to a material alteration and extension of its object and powers (2). And the Lord Chancellor (Lord Brougham) said that he was of opinion that the right of making such an application was incident to a corporation of this nature, and refused an injunction to restrain the Grand Junction Waterworks Company from applying to Parliament for an Act authorizing the company to procure its supply of water by means of an aqueduct from the river Colne instead of the Thames, as authorized by the existing

(1) *Liverpool (Mayor, &c.) v. Chorley Waterworks Company*, 2 De G. M. & G. 852.

(2) *Ware v. Grand Junction Waterworks Company*, 2 Russ. & My. 470.

Acts under which it was incorporated at such terms as they should mutually agree upon; and a subsequent Act provided that the company should only demand reasonable sums; Lord Chancellor Eldon held, that a Court of Equity had no jurisdiction upon an offer to pay either a reasonable price, or that which was originally agreed upon, to compel the company to continue a supply to any inhabitant beyond the term of his contract, or to restrain them from discontinuing such supply until the decision of the question by a trial at Law (1); and if the supply of water depended upon the reasonableness of the price and not upon contract, still a Court of Equity could not interfere, as there was no mutuality, the company not being able to compel a person to take water (2). Where the B. Company, possessing springs of water of their own, covenanted, upon selling to the A. Company a portion of those springs, to take from the A. Company the entire supply of water they might require for certain specified purposes, and that they would not supply any of the places (their own premises forming part of the district) which the A. Company was authorized to supply by Act of Parliament; and the B. Company afterwards leased a portion of their premises, through which portion their own stream of water ran, thus supplying their lessees with water from this stream; Vice-Chancellor Sir R. T. Kindersley held, that the B. Company was precluded by the covenant from using their own supply of water for the purposes for which they had stipulated to take water from the A. Company (3); but that it could not be decided in the absence of the lessees of the B. Company whether the supply of water furnished to them by the B. Company could be stopped, but the Court directed an inquiry as to what damages the A. Company had sustained and was sustaining by reason of the B. Company supplying their lessees with water; and a delay of twelve years in making the complaint was held, here, as not amounting to acquiescence, or to an abandonment of the plaintiffs' rights (4).

(1) *Weale v. West Middlesex Water-works Company*, 1 J. & W. 358.

(2) *Id.* 374.

(3) *Hartlepool Gas and Water Company v. West Hartlepool Harbour and Railway Co.*, 12 L. T. (N. S.) 366.

(4) *Ib.*

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Canal Companies.

4. Where, by virtue of an authority contained in an Act of Parliament, an arrangement had been come to between two canal companies, whereby a communication was formed between the defendants' canal and the plaintiffs' by a series of locks; and the consequence was that whenever a boat passed through the line of the locks a quantity of water flowed from the defendants' (the higher) canal, to the plaintiffs' (the lower); and after this right had been enjoyed (though with variations in amount) uninterruptedly for seventy years, the defendants, with a view of economising their water power, made preparations for pumping back the water at the lowest but one of the locks to a higher level, thereby very materially lessening the flow of water into the plaintiffs' canal; Vice-Chancellor Sir J. Stuart held, that the plaintiffs were entitled to have the flow of water into their canal continued uninterruptedly (1). Where a canal company, with power under their Act to take compulsorily the lands of incapacitated persons, upon payment of a perpetual rent, to be fixed by award, in 1797 entered upon lands belonging to an infant, and an award was made fixing the amount of the annual rent to be paid by the company, but the award, however, was informal, the powers of the Act not having been complied with; however, this was not known to any of the parties, and no conveyance was ever executed; and the infant attained twenty-one in 1806, and from that time the company—continuing in possession of the land—paid an annual rent, though not the annual rent fixed by the award; the Lord Chancellor, affirming a decision of the Master of the Rolls, held, that the company had not acquired a title under their Act, and was not entitled to a conveyance on the ground of adoption of and long acquiescence in, the award; but that the lands must be treated as having been taken by the company for the purposes of their Act, and that they were entitled to perfect their title, on the principle acted upon in *Beaufort (Duke of) v. Patrick* (2), namely, that of the sanction of and acquiescence in the outlay upon the works (a

(1) *Staffordshire and Worcestershire Canal Company v. Birmingham Canal Company*, 11 L. T. (N. S.) 364.

(2) 17 Beav. 60.

canal); but that they must proceed to take the lands under the powers of their Act, and ascertain the proper compensation (1). In the case of *Beaufort (Duke of) v. Patrick* (2), an Act of 1794 had authorized the making of a public canal through lands of which A. was the owner and B. his lessee; and, upon payment of the compensation, the land was to vest in the company; the canal company made an arrangement in respect of the compensation with B., but not with A.; the canal was made, as found by a special verdict at Law, "with the full consent, &c., of A.," and the canal was enjoyed by the company until the expiration of the lease in 1844; the devisees of A. then recovered at Law the land taken for the canal; upon a bill against the devisees to restrain further proceedings at Law for recovering the premises, and for a conveyance from the devisees, the plaintiff offering to pay any compensation which might be due under the Act; the Master of the Rolls, Sir J. Romilly, held, that in Equity, A. having thus sanctioned the formation of the canal, was not entitled to obtain possession of the land covered by the canal, or to interfere with the use thereof, but only to a fair compensation to be determined by the agricultural value of the land taken, as calculated in 1844, and not in 1794; and further, that persons who had bought A.'s property with notice in the conditions of sale as to the canal were equally bound by the same equity, and that this Court might itself determine the amount of compensation. Ownership acquired in land by a public company under their compulsory powers, for the purpose of their works, is a qualified ownership, to be restricted to the purposes expressed in the Act, those purposes being of the essence of the contract; and therefore the landowner, whose comfort and enjoyment of the remainder of his estate are affected by the company applying the ownership for other purposes not contemplated by the Act, is entitled to an injunction to restrain the use of the land for such purposes (3). And where by an Act of Parliament a company had been formed for constructing a canal, and the lands to be taken for that purpose had been

Ownership acquired in land by a public company under compulsory powers, for the purpose of their works; is a qualified ownership, to be restricted to the purposes expressed in their Act.

(1) *Somersetshire Coal Canal Company v. Harcourt*, 24 Beav. 571; 4 Jur. (N. S.) 1, 671; 27 L. J. (Ch.) 625.

(2) 17 Beav. 60.

(3) *Bostock v. North Staffordshire Railw. Co.*, 5 De G. & Sm. 584; 3 Sm. & G. 283; 2 Jur. (N. S.) 248; 3 Jur. (N. S.) 245; 25 L. J. (Ch.) 325.

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vested in the company, "to and for the use of the navigation, but to or for no other use or purpose whatever;" and by a subsequent Act the company had been authorized to purchase lands for making a reservoir for supplying the canal with water, but under the powers and restrictions contained in the former Act, and by subsequent Acts, the canal, and all powers and obligations, became vested in a railway company; and the navigation company took land from B., and thereon formed the Rudyard lake or reservoir, adjoining which B. was possessed of a mansion-house, and was entitled to a right of fishing in part of the lake, but the railway company was possessed of the land covered with the water of the lake; and in 1851 the company issued a programme for the celebration of a "grand *fête* or regatta" on the lake, against which the solicitor of the plaintiff remonstrated, but the company persisted in holding the *fête*, which resulted in injury to B. and her property; and on the issuing of a programme for another *fête*, B. filed a bill, praying that the company might be restrained from holding the *fête*; and on an undertaking being given by the company, the motion stood over, and subsequently an action was brought by B. against the company, but the jury could not agree on a verdict; and in December, 1851, the motion for an injunction was again made, when the Court continued the order previously made until after the assizes; and on the new trial a verdict was returned for the plaintiff with nominal damages. An injunction was again moved for and granted, but the Court directed a case for the opinion of the Queen's Bench, and on the question submitted to the judges a majority certified in favour of the plaintiff. The legal right of the plaintiff, to protect which the suit was instituted, having thus, by a Court of Law, been affirmed, Vice-Chancellor Sir J. Stuart held, that the legal right ought to be protected, and accordingly granted a perpetual injunction to restrain the company from using the reservoir to the injury of the plaintiff, for the purpose of letting out pleasure boats for hire thereon, or for the exhibition of a regatta thereon, or for any other purposes than those mentioned in and authorized by the Acts of Parliament, namely, the supply of water to the canal (1). The rights of ownership in

The rights of ownership in

(1) *Bostock v. North Staffordshire & G. 283; 2 Jur. (N. S.) 248; 3 Jur. Railw. Co.*, 5 De G. & Sm. 584; 3 Sm. (N. S.) 245; 25 L. J. (Ch.) 325.

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public companies by Act of Parliament are, by the settled doctrine of the Court, restricted and qualified by the terms of the legislative contract; and therefore the above-mentioned Act enacting that the fee simple and inheritance of property were to vest in a company "to and for the use of the navigation, but to or for no other use or purpose whatever;" the Vice-Chancellor held, that the words were inserted for the benefit of the vendors of the land (1). And where purchases of land are made under the compulsory powers of an Act of Parliament, the purchasers on the one hand, and the vendor on the other, have a right to confine the exercise of the ownership to the specified purpose (2). An Act of Parliament (33 Geo. 3, c. lxxx.), incorporated certain persons as a company for the purpose of making a canal, and gave them powers to purchase and hold lands for the purposes of the Act; and it authorized persons to "contract for, sell, and convey their lands," gave a form of conveyance "of all the estate, right, title, and interest" of the person conveying; and enacted that all such contracts, conveyances, and assurances should be valid to all intents, &c. S. was a tenant of copyhold land, a portion of which was wanted for the purposes of the canal; he sold it to the company, and executed a conveyance according to the form given by the Act; the land was then applied to the purposes of the canal. On the death, many years after, of S., whose name still appeared on the Court Rolls, the lord made a proclamation for the heir of S. to come in and be admitted as a tenant on the rolls of the manor. No one appeared to claim admittance, and the lord seised the land *quousque*. He afterwards brought ejectment against the canal proprietors, and obtained judgment against them on the ground that the conveyance under the Canal Act had only vested in them an equitable estate in the copyhold land. He then interfered with the course of the navigation by stopping vessels and hindering the navigation of the canal. The canal proprietors thereupon filed a bill against him, praying that the customary heir of S., or such other person that the plaintiffs might appoint, might be admitted to the copyhold premises, the plaintiffs undertaking to pay the fine and

fee conferred on public companies by Act, are restricted and qualified by the terms of the legislative contract.

(1) *Bostock v. North Staffordshire Railw. Co.*, 5 De G. & Sm. 584; 3 Sm. (N. S.) 245; 25 L. J. (Ch.) 325.

(2) *Ib.*

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fees upon such admission, and for a perpetual injunction. The Vice-Chancellor of England made a decree, directing that the customary heir of S. (who had been made a party to the suit) should be admitted tenant to the copyhold premises in question, and when admitted should hold the same as trustee for the plaintiffs in the suit, and the amount of the fine was referred to the Master, and granted an injunction as prayed; and on motion subsequently granted an injunction to restrain the defendant from bringing actions against the canal company; and the House of Lords affirmed this decision, as D., the appellant and purchaser of the manor, having seised *quousque*, and having recovered at Law, could not be allowed to contend that the legal estate of S. had passed to the company, and that his customary heir was a stranger (1). Unless an actual injury results to a private individual himself from the excessive exercise of the powers of a company, he is not entitled to an injunction; and where there has been an excess of the statutory powers granted to a company, but no injury has been occasioned to any individual, and there is none which is imminent or of irreparable consequence, the Attorney-General can alone obtain an injunction to restrain the exorbitance (2). But where by Act of Parliament a canal company is empowered to construct a reservoir, raising the water to a certain height; if by exercising their powers to the extreme limit the effect would be to cover with water other lands than those the company had taken; *semble, per* the Lord Chancellor, that the landowner might have obtained relief in Equity, and have compelled the company to purchase these additional lands, if the company's compulsory powers had not expired; but if the compulsory powers had expired, there could be no doubt that the company would be restrained by injunction (3). Where, however, a company having power by Act of Parliament to raise an embankment to a certain height, exceeds that height, a neighbouring landowner is not, on account of the possibility of injuring his lands, entitled to an injunction against

(1) *Dimes v. Grand Junction Canal Company*, 3 H. L. C. 794; 17 Jur. 73; 3 De G. & J. 212; 5 Jur. (N. S.) 25; 28 L. J. (Ch.) 153; *et vide Att.-Gen. v. Grand Junction Canal Company v. Dimes*, 17 Sim. 38. *Great Northern Railw. Co.*, 29 L. J. (Ch.) 794.

(2) *Ware v. Regent's Canal Company*, (3) *Ib.*

the company, but the right to such injunction is in the Attorney-General on behalf of the public; and a bill of a landowner to restrain a company from permitting the embankment to remain as constructed was dismissed by the Master of the Rolls, Sir J. Romilly (whose decision was affirmed by the Lord Chancellor), without prejudice to any action the plaintiff might be advised to bring (1).

5. A society, incorporated in 1791, located at the Falls of the Passaic (U.S.), pulled down a gate and waste-way of the canal of the Morris Canal Company, incorporated in 1824, and discharged the water from the canal into the Passaic above the falls. The canal company repaired the breach, and filed their bill against the society for an injunction, which was granted. The society filed a cross bill, setting up an agreement, stating breaches thereof, and praying a decree for a specific performance thereof. A demurrer to the bill was overruled (2).

6. Where the proprietors of a canal were enjoined from obstructing the use of the towing path, which the public had a right to use as such, it was held, that obstructions by the defendants to the use of the path for other purposes were not a breach of the injunction, though they had no legal right to make them (3).

CLAUSE 5.

Pier Companies.

7. A pier company—the Deptford Pier Company—under the powers of their Act of Parliament issued debentures by which they mortgaged their tolls to persons who had lent them money for the purposes of their undertaking; and two creditors of the company, who held no security on the tolls, recovered judgments in actions against the company—which were undefended—for the debts due to them, whereupon the debenture creditors filed a bill against them and the company, alleging that they themselves had the first charge on the lands of the company, and that the plaintiffs in the actions colluded with the directors of the company,

(1) *Ware v. Regent's Canal Company*, 3 De G. & J. 212; 5 Jur. (N. S.) 25; 28 L. J. (Ch.) 153; *et vide Att.-Gen. v. Great Northern Railw. Co.*, 29 L. J. (Ch.) 794.

(2) *The Society, &c. v. The Morris, &c.*, 2 Halst. (Ch.) 252; 1 Halst. (Ch.) 203 (Amr.)

(3) *Bosley v. Susquehanna, &c.*, 3 Bland. 63 (Amr.)

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and intended to sue out *elegits* and to take possession of the lands of the company, and praying for an injunction to restrain them from so doing, and for a receiver of the tolls; Vice-Chancellor Sir L. Shadwell allowed a demurrer to the bill for want of equity. The Vice-Chancellor said the plaintiffs had no claim upon the property of the company, except under the debentures, which were only a security upon the tolls, rates, and duties, and not on the lands of the company (1). Where, under the powers of the Thames Embankment Act, 1862, the temporary diversion of an existing pier, and ultimately the substitution of a new pier in its place, was contemplated, and the right of the existing pier belonged to a company, under a revocable license from the Conservators of the Thames, and it did not appear that the enjoyment of the benefit of the license would be destroyed by the intended works themselves, though they might lead to its revocation; upon a bill to restrain the Board of Works from proceeding until they made compensation under the Lands Clauses Act, Vice-Chancellor Sir W. P. Wood held that the pier company was not entitled to compensation as a condition precedent, their easement not being about to be permanently used or taken by the Metropolitan Board of Works, so as to necessitate the assessment and payment of compensation (pursuant to s. 84 of the Lands Clauses Act) before proceeding with the works affecting the pier, and that the remedy of the company was under s. 68, as injuriously affected (2).

SECT. 3. *Insurance Companies.*

Where it was usual and advantageous for an insurance company to make certain payments, not strictly bound to be made, but which were

1. Where it appeared that it was usual and advantageous for companies to make certain payments objected to, although not strictly bound to do so, Vice-Chancellor Sir W. P. Wood held that these payments were a mode of carrying on the business with which the Court could not interfere. And where directors of an insurance company offered to pay losses caused by a gunpowder

(1) *Perkins v. Deptford Pier Company*, 13 Sim. 277; 12 L. J. (Ch.) 212. *Metropolitan Board of Works*, 11 Jur. (N. S.) 337; 34 L. J. (Ch.) 202; 13 W. R. 535.

(2) *Temple Pier Company v. Metro-*

explosion, although their policies contained an express exception of such losses, at the same time not admitting any legal liability to do so; on a bill by a shareholder to restrain the payments, the Court, on the ground above stated, and on the ground (as alleged in the answer of the directors) that the payments were conducive to the welfare of the society, and that it was a legitimate mode of promoting the objects of the concern, refused to interfere, and dismissed the bill with costs (1).

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conducive to the welfare of the society, the Court refused to restrain the payments.

2. If the Court considers that a party will not be damnified by the proceedings sought to be restrained remaining *in statu quo* until the hearing of the cause, it will not grant an interlocutory injunction where the principal part of the arrangement sought to be restrained has been carried out. And where a bill had been filed by a policy-holder with participation of profits in a life insurance company to restrain such company from carrying out an arrangement for a transfer of the funds and assets of that company to another company by way of amalgamation, for an account of the assets and liabilities of such first mentioned company, and for a receiver, Vice-Chancellor Sir W. P. Wood refused an interlocutory injunction (2).

If the Court considers a party will not be damnified by the proceedings sought to be restrained remaining *in statu quo* until the hearing of the cause, it will not grant an interlocutory injunction.

3. On a bill by some directors of a mutual insurance company, constituted by deed, against another director, alleging misconduct, to restrain him from receiving money on account of the company, and from doing certain other acts, the Court refused to interfere, by continuing an injunction, on the ground that the company had not acted upon its regulations, and that the plaintiffs had not made use of the power of regulation given them by the deed (3).

4. A company filing a bill, as a defence to an action at law on a policy, to restrain the action to set aside the policy on the ground of fraud, and for discovery, is a cross proceeding within the meaning of the rule that exempts a plaintiff in a cross suit from having to give security for costs, and notwithstanding s. 69 of the Companies Act, 1862 (4).

(1) *Taunton v. Royal Insurance Company*, 2 H. & M. 135.

(3) *Ellison v. Bignold*, 2 Jac. & W. 503.

(2) *Bishop v. Scott*, 7 L. T. (N. S.) 570.

(4) *Accidental and Marine Insurance Company v. Mercati*, L. R. 3 Eq. 200; 15 W. R. 88; 15 L. T. (N. S.) 347.

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CHAPTER VII.SECT. 4. *Banking Companies.*

The declaration of a dividend gives the shareholders a legal right to the payment of that dividend—injunction refused as to dividend declared, granted as to future dividends.

Directors of a banking company not allowed (here) to set up want of observance of formalities to fix defendant as a continuing shareholder, and transfer of shares, though invalid at Law, yet supported (here) in Equity.

1. The declaration of a dividend gives the shareholders a legal right to the payment of that dividend, and the Court will not, in the absence of the shareholders, interfere with that right, and a plaintiff, in order to be able to file a bill on behalf of himself and other persons, must have an interest identical with such persons (1). In this case a bill had been filed by one of the shareholders against the directors of a banking company and the company, for an injunction to restrain the directors from paying a dividend already declared, and from declaring or paying any future dividends except out of the profits of the bank, but the other shareholders were not before the Court; Vice-Chancellor Sir R. T. Kindersley granted an injunction as to future dividends, but refused to restrain the payment of the dividend that had been declared.

2. Where a banking company had been established under the 7 Geo. 4, c. 46, and by its deed of settlement it was declared that no transfer of shares should be permitted, except upon notice to the directors, and on consent of "a board of directors," such consent to be signified by a certificate in writing, signed by three directors at the least; and if such consent was refused, the shareholder might require the directors to buy his shares at the market price of the day; and, after a consent given, the name of the transferee was entered into the "share register book," and the entry there was conclusive against him, and no shareholder could compel an inspection of the books of the company; and the defendant in the appeal to the Lords, being a shareholder, desired to transfer his shares to different individuals, and sent the proper notices to the directors, and received back a consent signed by three directors, on which he completed the transfers; and the transferees' names had been entered in "the share register book;" and the returns made to the Stamp Office under the 7 Geo. 4, c. 46, by the company omitted the name of the defendant from the list of shareholders, and inserted it in the list of those who had ceased to be shareholders; and the transferees afterwards received the regular notices of meetings, &c.; but the directors afterwards

(1) *Lawcett v. Laurie*, 1 Dr. & Sm. 192; 7 Jur. (N.S.) 61; 8 W. R. 699.

instigated a creditor to sue the defendant (in the appeal), and, to enable him to succeed, re-transferred the shares into the name of the defendant (in the appeal) in their books, and made a new return to the Stamp Office, including him as a shareholder; and the creditor recovered at Law; and the directors sought to impeach the original transfers, on the ground that the notices had never been submitted to a board of directors, nor the consents given by such board, but that the consent had merely been examined by the managing director alone, then signed by him, and afterwards signed by two other directors; and it appeared that this mode of transacting the business of the company had existed ever since the formation of the company; the House of Lords held (affirming a judgment of the Master of the Rolls, Lord Romilly), that such being the case, the directors could not, in this instance, set up their own want of observance of the formalities required by the deed of settlement as a ground on which to fix the defendant (in the appeal) with liability as a continuing shareholder, and that their course of dealing bound them; and the original transfers, though invalid at Law for want of a proper consent of "a board of directors" to the transfer, were yet, under the above circumstances, supported in Equity (1). In this case the creditor of a joint stock banking company had sued the company, and obtained judgment, and then, at the desire of the directors, had issued a *scire facias* against the defendant (in the appeal), the plaintiff in the Court below, who obtained a perpetual injunction to restrain execution upon the judgment, and a declaration that he had ceased to be a partner in the concern (2). And (*per* Lord St. Leonards) where a company has, under the 7 Geo. 4, c. 46, made use of a creditor to proceed against a person as a shareholder when that person ought not properly to be placed in that position, he is entitled to relief (3). And where A., a shareholder in the Agricultural and Commercial Bank of Ireland, sold in 1837 his shares to the company, who paid him therefor, and entered the sale in their books, and the printed deed of transfer required by law was filled up and executed by the plaintiff, but not by any of the trustees of the bank, and no memorial of transfer was executed, and in the

(1) *Bargate v. Shortridge*, 5 H. L. C. 297; 24 L. J. (Ch.) 457; *Shortridge v. Bosanquet*, 16 Beav. 84.

(2) *Ib.*

(3) *Ib.*

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register filed in November, 1837, A.'s name appeared as having ceased to be a partner, and his name was omitted in the annual register of shareholders filed in the successive years from 1838 to 1842; and in 1843 A.'s name was again replaced on the register of shareholders in pursuance, as alleged by A., of a fraudulent arrangement between the bank and B., a creditor on the foot of debentures issued subsequent to 1837, in order to make A. liable; and B., having obtained judgment against the bank on a plea of confession in an action on the debentures, sued out a *scire facias* thereon against A. as a shareholder; a perpetual injunction was granted to restrain B. from proceeding at Law against A. upon the *scire facias*, and to restrain the bank from placing A.'s name on the next ensuing annual register (1).

Where the transfer of shares is made subject to the approval of the directors, the right of approval must be exercised reasonably.

3. Where by the terms of a deed of settlement of a bank all transfers of shares therein are expressly made subject to the approval of the court of directors, there is no doubt that the company must exercise their right of approval reasonably (2).

4. Where the deed of settlement of a joint stock banking company provided that no person should become a shareholder without the consent of the directors; and in case the board should refuse to consent to any transfer of shares, they should, at the request of the holder, be obliged to purchase the same out of the funds, and on behalf of the company, at a price, in case the parties should not agree, to be fixed by arbitration; and the plaintiff contracted to sell his shares, but the board refused to consent to the transfer, and he then required the board to purchase them; and the plaintiff's shares not being purchased for the company, and an action being afterwards brought against him for calls made subsequently to his application to sell them, he filed his bill to compel the company to purchase the shares, and to restrain the action; on a motion for the injunction, the Court held, that the fact that at the time the application was made by the plaintiff to the board to purchase his shares out of the funds, and on behalf of the company, and thenceforward, the company had no funds applicable to the purchase of shares, was a defence to the equity of the plaintiff

(1) *Taylor v. Hughes*, 7 Ir. Eq. Rep. 528. *Bank of India, London, and China*, 14 W. R. 71.

(2) *Robinson v. Chartered Mercantile*

founded on the provisions of the deed to compel such purchase; that it did not follow from the absence of such funds of the company that the board of directors was, therefore, under all circumstances, bound to adopt the alternative of permitting the plaintiff to transfer his shares to any other person; and that the fact of the price at which the plaintiff had contracted to sell his shares shewing that they were then nearly valueless, and the further fact that in the following month the banking company suspended its payments, afforded sufficient *prima facie* evidence that the board were justified in not purchasing, or permitting the transfer of the shares, to induce the Court to refuse to stay the action for calls until the hearing of the cause, except upon the terms of bringing the amount into Court; but the question, whether the board were justified by the facts of the case in refusing either to permit the transfer of the shares, or to purchase them for the company, was a question to be tried in Equity (1).

5. In *Bullock v. Chapman* (2) Vice-Chancellor Sir J. L. Knight Bruce refused, upon an interlocutory application, to restrain by injunction a banking company from returning to the Stamp Office, under the 7 & 8 Vict. c. 113, among the names of the shareholders in the company, the name of a person who, by his bill and affidavits, alleged facts to shew that he had ceased to be a shareholder, his case not being sufficiently clear on the evidence.

6. A *bonâ fide* holder of a bill of exchange drawn under an open letter of credit, and taken by him on the faith of such letter of credit, has a right of action against the grantor of the letter of credit in case of his refusal to accept the bill (3). And where *M. & Co.*, by their bill of complaint, averred that, according to the ordinary course of dealing in reference to letters of credit granted to foreign firms, the foreign firm could only obtain letters of credit upon the guarantee of some English firm; and that the foreign firm stipulated to use the letters of credit only for the purpose of buying goods to be consigned to England, and to transmit the bills of lading to the English firm as a security for the repayment of the bills of exchange drawn under the letters of

(1) *Taft v. Harrison*, 10 Hare, 489.

(2) 2 De G. & Sm. 211; 12 Jur.
738.

(3) *Maitland v. Chartered Mercantile Bank of India, London, and China*,
38 L. J. (Ch.) 363.

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credit by a mail not later than that which carried the bills of exchange; and open letters of credit were granted to F. & Co., a China firm, on the guarantee of M. & Co., an English firm; and F. & Co., in fraud and violation of their agreement with M. & Co., drew bills under them not protected by shipping documents, and indorsed them for value to the C. Bank, who had no actual notice of the agreement between F. & Co. and M. & Co.; it was held by Vice-Chancellor Sir W. M. James, that the C. Bank was entitled to require the grantors of the letters of credit to accept the bills, and that M. & Co. had no equity to restrain them from procuring such acceptance (1). And, also, that in reference to open letters of credit no such custom exists as M. & Co. averred; and that, even if there was such a custom, the rights of the C. Bank as *bonâ fide* holders for value could not be affected by the mere constructive notice of the agreement between M. & Co. and F. & Co. which the custom would imply (2).

7. Where D. sold shares in a bank through a broker on the Stock Exchange, which were bought by N., as a dealer, in the usual way, and on the name-day N. gave the name of E., an infant, as the purchaser, and the shares were transferred into and registered in his name, and three months afterwards the bank was ordered to be wound up, and D.'s name was restored to the register in the place of E.'s, and D. was compelled to pay calls upon the shares, and D. brought an action against N. to recover the amount of the calls, and N. filed a bill against the father of E. (whom he alleged to be the real purchaser of the shares); and D. and N. moved for an injunction to restrain D. from proceeding with the action; Lord Chancellor Hatherley held (reversing a decision by Vice-Chancellor Sir J. Stuart), that N. had no equity to restrain D. from proceeding at Law; and that the question whether N., the dealer, was discharged, was a question to be decided at Law (3).

8. The authority to issue an injunction against a bank on the application of the bank commissioners (U.S.), and to make such injunction perpetual, as set forth in Gen. Stats. c. 57, s. 7, is very broad and comprehensive. It is not limited to cases where the

(1) *Maitland v. Chartered Mercantile Bank of India, London, and China*, 38 L. J. (Ch.) 363.

(2) *Ib.*

(3) *Nickolls v. Eaton*, 19 W. R. 172.

corporation is insolvent, or its further continuance in business will be hazardous to its creditors, but extends to all cases where a bank has exceeded the powers conferred on it, or has failed to comply with any of the rules, restrictions, or conditions provided by law for its regulation and management; nor is the nature of the injunction defined or limited by any legislative restriction. This is left to be determined by a sound judicial discretion. The object of conferring this very extensive jurisdiction in Equity over this class of corporations is obvious. The nature of the important powers and duties with which they are intrusted renders it expedient and necessary that they should be subjected to careful supervision, and that any irregularity or illegality in their mode of conducting business should be promptly checked and prevented (1).

9. Where a lien and power of sale upon and over the shares are given by charter to a bank for debts due from the stockholders to the bank, Equity will enjoin a sale, or, under equitable circumstances, set aside a conveyance of shares attempted or made by the bank against the will of an insolvent stockholder, for a debt really due to a director, under colour that it is due to the bank; such sale being a fraudulent abuse of a statute power (U.S.), and a fraudulent attempt without the authority of the stockholder to give preference amongst his creditors (2).

10. Where a stockholder of a bank filed a bill to compel the president and directors to re-transfer to the bank certain shares which the bank itself had owned, and which the Defendants had sold and purchased at less, as was alleged, than the market value; the Court held that the corporation should have been made a party to the bill (3).

SECT. 5. *Bank of England.*

1. Where the Bank of England, having notice of a bill filed in Chancery, refused to permit a transfer of stock, the Court, though there was no injunction, ordered that they should permit the transfer on a certain day, unless the plaintiff obtained an injunction

(1) *Per* Bigelow, C.J., *Com. v. Bank*, (2) *Seagraves v. Railroad Bank*, 4
&c., 4 Allen, 8, 9 (Amr.) R. I. 372 (Amr.)

(3) *Charleston, &c. v. Sebring*, 5 Rich. Eq. 342 (Amr.)

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in the meantime (1). In *Birch v. Corbyn* (2) Lord Chancellor Thurlow, on a motion by the defendant that the bank (which had heard of the suit and would not permit a transfer), be ordered to permit a transfer of stock, refused to make the order; he said it was, in fact, requiring a decree in the cause, by an interlocutory order, for the defendant undertook to prove that the plaintiff had no lien on the stock, and that it was impossible to make an order upon the stakeholder to quit the stakes, which was the main object in the cause. Subsequently the bank was made a defendant, and upon motion on behalf of the bank the Lord Chancellor held, that where money in the public funds is the subject of a suit, to which the bank is made a defendant, the Court will not, on the application of the bank, make any order on the litigating parties to restrain them from proceeding at Law against the bank to compel a transfer, but that the bank must file a bill of interpleader (3).

2. Where, by a decree made thirty years prior to the present application, an account had been directed of a testator's personal estate, and of his debts and testamentary expenses, and an injunction had been granted to restrain the Bank of England from permitting the transfer of a small sum of stock belonging to the testator's estate, but no further proceedings had been had in the suit; the Court, upon the petition of the only party interested, dissolved the injunction, so that an immediate transfer of stock might be made to the petitioners, without carrying the suit any further (4).

A joint stock bank in London restrained accepting bills if payable at less than six months from acceptance.

3. Where a bank at Kingston, in Upper Canada, drew a bill, payable at sixty days after sight, directed to G. P., manager, Joint Stock Bank, London, which was accepted by G. P., who was the manager of the London Joint Stock Bank, but not a shareholder or partner in that concern, in these words, "Accepted at the London Joint Stock Bank—G. Pollard;" and by an arrangement between the London Joint Stock Bank and the Canada bank, the London Joint Stock Bank guaranteed the payment at maturity of all bills of exchange so drawn by the Canada bank to the extent of £40,000; it was held, that this transaction—the bills having

(1) *Ross v. Shearer*, 6 Madd. 1; 5 Madd. 458.

(2) 1 Bro. C. C. 571.

(3) *Birch v. Corbin*, 1 Cox, 144.

(4) *De Beaufort v. Archdeacon*, 1 Y. & C. 549.

less than six months to run—was a violation of the exclusive privileges of the Bank of England within the 3 & 4 Will. 4, c. 98 (by the 3rd section of which any partnership, although consisting of more than six persons, is permitted to carry on the business of banking in London, provided it does not, during the continuance of the privileges of the Bank of England, borrow, owe, or take up in England any sums of money on their bills or notes payable on demand, or at any time less than six months from the borrowing thereof) and the other Acts relating to banks; and an injunction was granted accordingly by the Master of the Rolls, Lord Langdale (which decision was affirmed by the House of Lords) against the London Joint Stock Bank, G. P., and their agents, to restrain them from accepting, or causing to be accepted, any bills of exchange payable on demand, or at any less time than six months from the acceptance thereof (1).

4. In *Green v. Bank of England* (2), where money had been invested by a bankrupt under a fictitious name, in order to defeat his creditors, the bank was ordered to erase such name and insert the name of the bankrupt.

5. Notwithstanding the 39 & 40 Geo. 3, c. 36, the Bank of England may still be made parties to a bill to restrain a transfer of stock filed since that Act (which makes it unnecessary to make it parties); and a general demurrer by the bank, on the ground that since that Act the bank could not be made parties to a suit merely to prevent a transfer of stock, was overruled (3). And in *Att.-Gen. v. Gale* (4) the Lord Chancellor, Lord Eldon, said—understanding doubts had been intimated—that he had not a particle of doubt in his mind of the propriety of his decision in *Temple v. Bank of England* (5). However, there is a *dictum* of Sir John Leach, in *Edridge v. Edridge* (6), that if the Bank of England is unnecessarily made a party the bill will be dismissed as against it with costs. In *Hammond v. Neame* (7) the bank was made a party for the security of a legacy (a sum of stock in respect of which the

The Bank of England may be made parties to a bill to restrain transfer of stock, notwithstanding 39 & 40 Geo. 3, c. 36.

(1) *Booth v. Bank of England*, 7 Cl. & F. 509; West, 298; *Bank of England v. Booth*, 2 Keen, 466.

(2) 3 Y. & C. 722.

(6) 3 Madd. 386.

(3) *Temple v. Bank of England*, 6 Ves. 770.

(4) 6 Ves. 772, n.

(5) *Supra*.

(7) 1 Swan. 35, 38.

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The Bank of England are not to look beyond the legal title to the trusts of a will.

suit was filed), its costs of suit were directed to be paid out of the capital of the legacy.

6. The Bank of England are not to look beyond the legal title to the trusts of a will, and therefore cannot prevent an executor from selling out or transferring stock into his own name (1); and though a residue is specifically given, the bank has no right to restrain the executor from transferring the funds (2). But where there was a bequest of stock to an executor for life, remainder to W., and the executor had bought W.'s reversionary interest, and the bank refused to allow a transfer, the Court, though it ordered a transfer to be made, nevertheless gave the bank their costs, considering the practice of the bank strictly right (3).

7. The Court will not entertain a motion for directing the Bank of England to remove a distingas from stock belonging to a partnership firm on an application of the defendant, the surviving partner, even after an answer has been filed by the defendant denying charges in the bill, and such a motion was refused with costs (4). Nor will the Court interfere to require the bank to transfer money which they withhold, on having been served with process, on a bill filed by the representative of a deceased partner against survivors of the firm, even for the purpose of paying the partnership debts (5).

8. The 5 Vict. c. 5, s. 4, has conferred on the Court no new summary jurisdiction with respect to granting injunctions, but the remedy provided thereby was intended only for limited and interim purposes, viz., to protect stock until the party having a claim to it can have time to assert that claim by bill (6). And where H. had obtained a restraining order under the 4th section of the above Act on the 30th of May, but had neglected to file a bill; upon a motion made on the 30th of June, to discharge the restraining order, the Court held, first, that the order could not stand without a bill filed; and, secondly, that although the Court had power to continue the order until a bill should be filed, yet that this was

(1) *Bank of England v. Parsons*,
5 Ves. 665.

(2) *Bank of England v. Moffatt*, 3
Bro. C. C. 260.

(5) *Id.* 6 Price, 405.

(3) *Pearson v. Bank of England*,
2 Bro. C. C. 529; 2 Cox, 175.

(4) *Toulmin v. Copeland*, 7 Price,
631.

(6) *In re Suisse*, 6 Jur. 654.

not, by reason of H.'s delay in filing a bill, a proper case for the exercise of such power (1). But a party having issued a distringas under the 5th section of this Act without filing a bill in due time afterwards, in consequence of which the distringas is taken off by the bank (the eight days after the request of the party in whose name the stock is standing to allow a transfer having expired), is not thereby precluded from making an application to the Court under the 4th section of the Act, which gives a summary jurisdiction, by petition or motion without a bill, to the Court of Chancery to restrain the Bank of England, or any other public company, whether incorporated or not, from permitting the transfer of stock in the public funds, or stock or shares in any public company, or from paying of dividends due thereon (2). And the fact that a party has obtained a distringas under the 5th section does not prevent him from applying for a restraining order under the 4th section, which operates as an injunction, and is in force until discharged (3); and notwithstanding a bill has been filed for the same purpose. And in *Ex parte Hertford* (4), where such a bill had been filed, the Court, upon the evidence, refused to discharge such an order. This case appeared to overrule *Ex parte Amyot* (5) in which case where, some time previously to the passing of the 5 Vict. c. 5, whereby the Equity jurisdiction of the Court of Exchequer was transferred to the Court of Chancery, a party sued out and lodged at the Bank of England a writ of distringas, in consequence whereof a restraint was put on the transfer of, and payment of the dividends upon, certain sums of stock standing in the bank books in the name of a deceased testator; but no bill was filed by such party for an injunction to stay the transfer; and after the Act had come into operation the same party, upon notice from the bank, presented a petition to the Lord Chancellor, under the 4th section of the Act, and obtained an injunction *ex parte* restraining the transfer and payment of the stock and dividends; and the executrix thereupon moved to discharge the order granting the injunction; the motion was granted, and it was held, that by the 4th and 5th sections of the Act, two concurrent

(1) *In re Suisse*, 6 Jur. 654.(3) *Ex parte Hertford*, 1 Ph. 129.(2) *lb.*(4) 1 Ph. 203; *v. p.* 359, *ante*, pl. 3.

(5) 1 Ph. 130; 6 Jur. 137.

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remedies were substituted in the Court of Chancery for the single remedy by distringas before existing in the Court of Exchequer; but that it was not intended by the Act to place a party in a better situation than he would have been in if the Act had not passed, in which case if he had sued out a second writ of distringas the bank would have paid no attention to it; and the order was discharged with costs, the petitioner, when obtaining it, not having brought all the circumstances of the case under the consideration of the Court. But the Lord Chancellor, in *Ex parte Hertford* (1) said that he had not intended in *Ex parte Amyot's case* to lay down any such rule—that a party who had sued out a distringas under the 5th section of the Act could not afterwards obtain an injunction under the 4th section; that he had merely decided that a party who had exhausted his remedy under the old practice in the Exchequer could not afterwards avail himself of the remedies given by the above statute.

9. Where the executors of A. indicted S. for embezzling in A.'s lifetime certain moneys belonging to A., with which S. had purchased stock in his own name, and H., who was A.'s residuary legatee, obtained an order under the 5 Vict. c. 5, restraining the transfer of the stock, and pending the trial this order was discharged; the Court, upon appeal, held, that H. was entitled to the order (2).

10. In *Doolittle v. Walton* (3), Lord Chancellor Bathurst said that the Court would not grant an injunction to prevent the transferring of stock till after the defendants had appeared or were in contempt for want of it, and upon notice; and in *Hammond v. Maundrell* (4) Lord Chancellor Eldon held, that upon an application under the 39 & 40 Geo. 4, c. 36, to restrain the bank from making a transfer, and without having made them parties to the bill, notice of the motion must be given to the defendants, unless where, from the necessity and urgency of the case, notice could not be given, and then that the application must be upon affidavit verifying that such necessity and urgency existed.

(1) 1 Phi. 129, 132.

(2) *In re Suisse*, 6 Jur. 654.

(3) Dick. 442.

(4) 6 Ves. 773, n.

SECT. 6. *Gas Companies.*PART I.
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1. The 68th section of the 8 Vict. c. 18, and, generally speaking, all statutory compensation clauses, afford no means of recovering compensation from a company for acts which are not made lawful by the special Act, and which, but for the special Act, would be lawful (1). And, *semble*, the words in the 68th section of the Lands Clauses Act, “injuriously affected by the execution of the works” mean the execution of the permanent works, such as the building of retort-houses, making a railway, &c., &c., and do not refer to the making of gas, or the user of the railway : *per* Crompton and Willes, JJ. And where by a special Act the Lands Clauses Act, “except so much as related exclusively to the purchase and taking of land by compulsion,” was incorporated with it, the Court held, that the 68th section of the Lands Clauses Act was not excepted, although that section was within the division of the Lands Clauses Act relating to “the purchase and taking of lands otherwise than by agreement” (2). And where, in 1832, a market gardener became the occupier of land and premises adjoining the works of a gas company ; and in 1836 he took a lease, which would have expired in 1853 ; but in 1850 he obtained a renewal of this lease until 1874 ; and at the time of the renewal the company were enlarging their works, and building a new retort-house, much larger, and nearer the market gardener’s premises ; and he brought an action in 1854 against the company for damages for the nuisance which the works occasioned to him as a market gardener ; and on the case coming on for trial, a reference had been agreed upon, and the arbitrator, by his award, had found that damage had accrued to a considerable extent ; but, notwithstanding the award, the company added to their works, and built a third retort-house ; on a bill filed for a perpetual injunction the House of Lords, affirming a decision of Lord Chancellor Cranworth and of Vice-Chancellor Sir W. P. Wood, held that the award of the arbitrator had sufficiently established the right of the market gardener at Law to such injunction without the verdict of a jury ; and that after the right

Generally speaking statutory compensation clauses afford no means of recovering compensation for acts not made lawful by the special Act, and which, but for the Act, would be lawful.

After a right has been

(1) *Broadbent v. Imperial Gas Light Company*, 3 Jur. (N. S.) 221 ; 26 L. J. (Ch.) 276.

(2) *Ib.*

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established at Law, it is for the Judge in Equity, upon an application for an injunction, to determine whether a nuisance is continued or abated by a public company.

An Act empowering a company to contract for purposes of public advantage ought not to receive a narrow construction.

has been established at Law, it is for the Judge in Equity, upon the application for an injunction, to determine whether a nuisance is continued, or has been abated, by a public company in exercising its powers; and although a *bonâ fide* alteration may have been made, with the object of abating the nuisance, the party is not bound to proceed at Law to ascertain the fact; and that the market gardener had no remedy against the company under the 8 Vict. c. 18. The only ground for seeking compensation under that Act is, where the injury alone is under the powers conferred by the Legislature; but where the wrong done is not authorized by those powers the common law right of action still remains (1).

2. An Act empowering a company to contract for purposes of public advantage, ought not to receive a narrow construction (2). Therefore in construing a gas company's Act, which, after requiring the consent of certain local commissioners to the breaking up of the pavements, provided, that where any consent was required, and should be obtained, by the company to break any pavement, to lay down pipes, or for any other purpose which might be required under the Act, nothing in the Act contained should (after such consent obtained, and after twenty-four hours' notice) prevent the company from breaking up the pavement for the purpose of laying down pipes, or for any other purpose which might be required under the Act; the Lords Justices, upon a bill by a gas light company to restrain the defendants from preventing or interfering with the plaintiffs in laying down pipes and breaking up the soil, pavement, &c., in the streets, held, that a construction "*reddendo singula singulis*" was not the correct one, and that the power to break the pavement was not to be confined to the particular purpose to which the consent had been expressly given (3); and they held that the Dover Gas Light Company have power, under the provisions of their Act of incorporation (3 Geo. 4, c. xv.), without the consent of the commissioners for executing the Paving Acts at Dover, but under the conditions in all other respects prescribed by their Act, to lay down in the streets of Dover in which gas-pipes

(1) *Imperial Gas Light and Coke Company v. Broadbent*, 5 Jur. (N. S.) 1319.

(2) *Dover Gas Light Company v. Dover (Mayor, &c.)*, 7 De G. M. & G. 545; 1 Jur. (N. S.) 812.

(3) *Ib.*

had been already laid down by them under the provision of their Act, and were still in use, additional gas-pipes parallel to and to be used with such others for the same purpose of supplying gas-light to the town (1).

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3. The purpose of the Metropolitan Gas Act, 1860 (by the 6th section of which every person is restrained from manufacturing or selling gas except the particular companies enumerated in the Act) is not to interfere with any person who was engaged in manufacturing gas, either for his own use or for the public, at the time when the Act was passed (2). And the Vice-Chancellor, Sir J. Stuart, said that the railway companies, and hotels in connexion with them, supplied, in this case, by the defendant with gas, were not the public within the meaning of the 54th section of the Act (3); by this section certain bodies are exempted from the operation of the Act, and any other person or persons making or supplying gas for his or their own use, and not making or supplying gas to the public as a trade or business.

Metropolitan
Gas Act, 1860,
ss. 6, 54.

4. The declaration of a chairman of the election of directors of a company is *primâ facie* evidence of the validity of such election (4). But the Vice-Chancellor said, in this case, that if the declaration had been done by means of a conspiracy, this Court would find its arm long enough to deal with such a fraud. Until the declaration is set aside such candidates have no authority to act as directors, and a bill filed in the name of the company, on the authority of two gentlemen claiming to be directors, against the defendants, who also claimed to be directors, to restrain them from acting as such, was, on motion, ordered, by Vice-Chancellor Sir W. M. James, to be taken off the file, with costs to be paid by the solicitor who filed it (5).

The declaration of a chairman of the election of directors is *primâ facie* evidence of validity of election.

(1) *Dover Gas Light Company v. Dover (Mayor, &c.)*, 7 De G. M. & G. 545; 1 Jur. (N. S.) 812.

(3) *Ib.*

(2) *Imperial Gas Light and Coke Company v. West London Junction Gas Company*, and *Great Western Railway Company*, 14 W. R. 1019.

(4) *Wandsworth and Putney Gas Light and Coke Company v. Wright*, 18 W. R. 728; 22 L. T. (N. S.) 404.

(5) *Ib.*

SECT 7. *Mining Companies.*

1. A cost-book mining company is a simple partnership formed under no Act of Parliament, and it is, therefore, necessary, in order to have an account, that all the members should be made parties to a bill for that purpose; and where a shareholder in such a company filed a bill against the managing committee, and against a creditor of the company, to restrain an action brought against him by the creditor at the instigation of the committee, and the bill also asked for an account as to the amount of the plaintiff's liability to the company, Vice-Chancellor Sir R. T. Kindersley granted an injunction to restrain the action, but, for the reason stated above, dismissed the bill as against the committee (1).

2. In *Lord v. Governor, &c., of Copper Miners* (2) Lord Chancellor Cottenham, overruling a decision of Vice-Chancellor Sir J. L. Knight Bruce, allowed a demurrer to a bill by one of the shareholders of an incorporated mining company, on behalf of himself and all the other shareholders, except the members of the governing body, who were defendants, impeaching several transactions of that body, which it appeared had been sanctioned by majorities at general meetings of the shareholders, and amongst which was a project to vest all the property of the company in trustees, for the purpose of liquidating its affairs; notwithstanding some vague and general charges of fraud and misconduct on the part of the defendants, and an allegation that, by the constitution of the company, no one but the governing body could convene a general meeting, the specific acts complained of not being clearly such as, in the opinion of the Court, it was incompetent to a majority of the shareholders to sanction. The Lord Chancellor said that he found all the complaints made by the individual shareholder to consist of acts within the powers of the corporation, and all sanctioned by general meetings of the shareholders, and no allegation raising any case for the interference of a Court of Equity with the exercise of such rights;

(1) *Sibley v. Minton*, 27 L. J. (Ch.) 53; *vide* 32 & 33 Vict. c. 19, The Stannaries Act, 1869, "An Act for amending the Law relating to Mining Partnerships within the Stannaries

of Devon and Cornwall, and to the Court of the Vice-Warden of the Stannaries."

(2) 2 Ph. 740; 1 H. & T. 85; 2 De G. & Sm. 308.

and that a Court of Equity could not assume jurisdiction in such a case without opening its doors to all parties interested in corporations and joint stock companies or private partnerships, who, although a small minority of the body to which they belong, may wish to interfere in the conduct of the majority; and that in *Foss v. Harbottle* (1) Sir J. Wigram had acted upon this principle; because the acts were capable of confirmation, and that in *Mozley v. Alston* (2) he had expressed his strong approbation of Sir J. Wigram's decision in that case; and that, here, the acts had been actually confirmed, and were therefore the acts of the whole body.

3. In a suit by the owners of a manor against a company to restrain trespass, by digging and carrying away minerals under certain turnpike roads within the manor and for damages, liberty was given, under the 25 & 26 Vict. c. 89, s. 87 (the Companies Act, 1862), to the plaintiff, after a winding-up order, to proceed with the suit, and also to amend, but not by adding new parties (3).

SECT. 8. *Market Companies.*

1. Where a market company had obtained a special Act, the preamble of which recited that a convenient site might be obtained between certain streets on the east and certain other streets on the west, and which enacted that the Market and Fairs Clauses Act, 1847 (10 Vict. c. 14), was incorporated therewith; and the 24th section authorized the erection of a market house on land described in the deposited plans, and by the 25th the company were enabled to alter and widen streets in the way pointed out on the deposited plans, and by the 30th to buy additional lands not exceeding two acres; and A. B. was the owner of land on the west side of one of the streets on the western boundary of the area spoken of in the preamble, and his land was described in the deposited plans, but it did not thereby appear that more was intended to be taken than enough to widen one of the streets named in sect. 25; and the company proceeded to take the whole land of A. B. compulsorily, and to build upon it a covered building

(1) 2 Hare, 493.

(2) 1 Ph. 790, 800.

(3) *Wyley v. Exhall Coal Mining Company (Limited)*, 33 Beav. 538.

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in addition to the market house authorized by sect. 24, whereupon A. B. filed his bill for an injunction, which the Master of the Rolls granted, holding that the company could only erect one market house, and not two, and that, on the east side; and that although the preamble could not control the enactments, it might be resorted to, to remove obscurity; but upon the company appealing, the Lords Justices held, that as the land of the plaintiff was described in the plan, and as, therefore, it might be wanted, the company were authorized to take it, and as by the general Act "the singular may mean the plural," the company were not restricted by the word "market house;" that the enactments of the special Act did not require a reference to the preamble to explain them, and dissolved the injunction; the company being the proper judges of what lands were necessary for the works (1).

SECT. 9. *Companies in General.*

1. A bill filed by shareholders in a company against directors alleged that the directors had purchased shares from the chairman, and that such purchase was a fraud upon the plaintiffs and the other shareholders, and not authorized by the constitution of the company or by the provisions of its deed of settlement, which, so far as it was set out in the bill, did not provide any remedy in such a case; the Lords Justices, affirming a decision of the Master of the Rolls, held, upon demurrer, that the bill shewed a good cause of suit. Lord Justice Knight Bruce said it was a bill by principals against their agents seeking to be relieved against a fraud which, as the former contended, was sufficiently alleged in the bill to have been committed by the agents, and that, of course, if this description were accurate, a demurrer was out of the question. The bill also alleged that certain shareholders had paid a call, but that the plaintiffs were ignorant of the names of such shareholders; and it was also held the bill was not demurrable for not making any of them parties. Lord Justice Knight Bruce said that if ignorance alleged by a plaintiff is of a fact which he is bound to know, he

(1) *Richards v. Scarborough Public Market Company*, 23 L. J. (Ch.) 110.

cannot probably suggest that effectually as an excuse, but that here it was ignorance of a fact which he was not bound to know (1).

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2. A company cannot by user acquire an exclusive right to use in its title of incorporation, a general term descriptive merely of the locality with which the business carried on by the company is connected (the object in this case being to secure a monopoly of the word "Colonial"); and the Court will not restrain the use of such general term by a new company, even though it is in evidence that the former company may have been prejudiced by similarity of name (2).

A company cannot by user acquire an exclusive right to use in its title a general term descriptive merely of the locality with which its business is connected.

3. In matters strictly relating to the internal management of a company, even though the course adopted is not within the terms of the instrument of foundation, the Court will not interfere. But if the matters complained of are plainly beyond the powers of the company, and are inconsistent with the object for which the company was constituted, the Court will interfere at the instance of the minority to prevent the act complained of from being carried out (3). In this case, directors of a company, acting *ultra vires*, but with the approval of a majority of the shareholders, sold to two of the body a portion of the company's property, the amount which they had paid up upon their shares being taken in part payment of the purchase money. But the Master of the Rolls, Sir J. Romilly, being of opinion that the transaction practically amounted to putting an end to the company, while it threw the debts upon the remaining shareholders, ordered the transaction to be declared void, and made a decree for the dissolution and winding up of the company, and that the value of the property sold should be made good by the purchasers (4). But in the same case there having been a sale of shares by certain members of the company to the directors on behalf of the company, sanctioned by a majority at a general meeting, the Court held that, assuming the transaction to be *ultra vires*, or improper, an acquiescence of six years on the part of the dissentient shareholders precluded them from impeaching it. The

The Court will not interfere in matters strictly relating to the internal management of a company, unless the matters are plainly beyond the powers of the company and inconsistent with its objects.

Though a transaction be *ultra vires*, acquiescence (here of six years) precludes impeaching it.

(1) *Hodgkinson v. National Live Stock Insurance Company*, 4 De G. & J. 422; 26 Beav. 473.

pany v. Home and Colonial Assurance Company, 33 L. J. (Ch.) 741.

• (3) *Gregory v. Patchett*, 10 Jur. (N.S.) 1118; 13 W. R. 34.

(2) *Colonial Life Assurance Com-*

(4) *Ib.*

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Master of the Rolls said "shareholders cannot lie by, sanctioning, or by their silence acquiescing in, an arrangement which was *ultra vires* of the company, watching the result, and, if it be favourable and profitable to themselves, to abide by it, and insist upon its validity, but if it prove unfavourable and disastrous, then to institute proceedings to set it aside (1). And the company being virtually at an end, needs not, in a bill to set aside such a transaction, to be brought before the Court in its corporate character (2).

Vendor cannot prevent purchaser buying another estate pending the first purchase, on the ground of being rendered thereby unable to complete the first purchase.

4. A vendor cannot prevent his purchaser from buying a second estate from some one else, pending the first transaction, on the ground that, by making such second purchase he may be rendered unable to complete his first. And the Court will not restrain a company from doing an act within the scope of its objects, on the ground that if the company does that act the doing of it may incapacitate the company from performing something else which is also within the scope of its objects (3). And where a company had been formed for the purchase of land at B., for the erection, &c., and maintenance of a brewery or breweries thereon, and also for the purchase of a particular brewery, called the North Street brewery, at B., and one of the articles of the association said "the directors shall purchase" the North Street brewery for £64,000; and there being a difficulty in raising the requisite capital, the directors proposed to purchase a smaller brewery at B.; upon some dissentient shareholders filing a bill to restrain the company from effecting the proposed purchase, on the ground that it was *ultra vires*, and would render the purchase of the North Street brewery impossible; the Master of the Rolls, Sir J. Romilly, refused an injunction, on the ground that it was not *ultra vires*, as the company was formed to purchase land at B. for a brewery, and the purchase of the North Street brewery was only a secondary object (4).

5. Although it is the undoubted right of every shareholder in a company to prevent the directors from exceeding their powers,

(1) *Gregory v. Patchett*, 10 Jur. (N. S.) 1118; 13 W. R. 34.

(2) *Ib.*

(3) *Syers v. Brighton Brewery Company (Limited)*, 11 L. T. (N. S.) 560.

(4) *Syers v. Brighton Brewery Company, Limited*; *Wright v. Brighton Brewery Company, Limited*, 13 W. R. 220.

still, where it appears that the plaintiff is merely a puppet in the hands of others, not shareholders in the company, who indemnify him against the costs of the suit, the Court will not interfere by interlocutory injunction (1).

6. Where a mortgage to the secretary of a company, registered under 19 & 20 Vict. c. 47 (the Joint Stock Companies Act, 1856), was authorized by a resolution passed at a meeting of the directors, who had ceased to be directors by being concerned in previous contracts with the company; the Master of the Rolls, Sir J. Romilly, held, that a sale by the mortgagee ought to be restrained until the hearing of the cause (2). And where three directors of this company had accepted bills payable to the company's bankers to obtain an advance of £3000, alleged to be necessary for the purposes of the company; and at a subsequent meeting of the directors, at which the three directors and one other director alone were present, it was resolved that the company should repay the loan, and "save harmless and keep indemnified" the three directors; the Master of the Rolls held, that this resolution did not authorize a mortgage to the three directors, and that they thereby, under sect. 47 of table B., in the schedule to the said Act of 1856, ceased to be directors, and an intended sale by the mortgagees was restrained until the hearing or further order (3). And where four directors of the same company met together, and passed a resolution to mortgage, and did mortgage, part of the company's property to themselves and another director, and some of the five mortgagees had ceased to be directors by being concerned in a previous contract with the company, the Master of the Rolls held that a sale by them under the mortgage must be restrained until the hearing of the cause (4).

7. Directors of a "limited" company will not be restrained from commencing business, and exercising their borrowing powers, until the whole of the nominal capital has been subscribed and
The Court will not restrain directors of a "limited" company from commencing business, and exercising borrowing powers, until whole of nominal capital is subscribed.

(1) *Filder v. London, Brighton, and South Coast Railw. Co.*; *Barchard v. Brighton, Uckfield, and Tunbridge Wells Railw. Co.*, 1 H. & M. 489.

(2) *Southampton Boat Company v. Rawlins*, 12 W. R. 331.

(3) *Southampton Boat Company v. Pinnock*, 12 W. R. 330.

(4) *Southampton Boat Company v. Muntz*, 12 W. R. 330.

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every share allotted, the Companies Act of 1862 clearly contemplating the commencement of business by a company before its capital has been fully raised (1); and, in the absence of fraud, it is not necessary that the whole of the nominal capital of a limited company should be subscribed before the business of the company can be carried on or its powers exercised (2).

The Court will
restrain pay-
ment of
interest on
amount paid
up of share
capital before
profits earned.

8. A majority of the shareholders in a limited company has no power, before any profits have been earned, to authorize the payment of interest on the amount paid up of the share capital, and such payment will be restrained, as being, in effect, a repayment of capital (3).

No specific
performance of
agreement for
purchase of
shares (here),
the company
having a right
of approval of
purchaser.

9. Where the deed of settlement of a company provided that the liability of a holder of shares should cease upon some person, to be approved by the directors, being placed on the register of shareholders in respect of such shares; and B. verbally agreed to sell, and A. to purchase, some shares belonging to B., and the consideration money was paid, but before a legal transfer was executed the company was ordered to be wound up, and the official liquidator, acting on behalf of the directors, declined to approve of the purchaser, and refused to register the transfer; the Master of the Rolls, Lord Romilly, held that the Court could not decree specific performance of the agreement, or restrain an action by the purchaser for the recovery of the purchase money. The Master of the Rolls said that every contract for the sale of shares, where the company has a right of approval, was conditional on the company accepting the purchaser as the proprietor of the shares (4).

No specific
performance
of an agree-
ment by com-
pany to em-
ploy a person
as broker.

10. The Court will not compel specific performance of an agreement by a company to employ a person as their broker, and the contract being at an end (having been broken by the company), Vice-Chancellor Sir W. P. Wood said that it was impossible to carry out that which was merely an adjunct to the principal relief sought, namely, an injunction to restrain the company from advertising, in breach of a stipulation contained in the agreement, the

(1) *M'Dougall v. Jersey Imperial Hotel Company*, 34 L. J. (Ch.) 28; 12 W. R. 1142; 10 Jur. (N. S.) 1043.

(2) *Ib.*

(3) *Ib.*

(4) *Birmingham v. Sheridan; Waterloo Life Insurance Company, In re*, 10 Jur. (N. S.) 415; 33 L. J. (Ch.) 571.

name of any other person than the plaintiff as their broker, and allowed a demurrer to the bill (1).

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11. The Court will, at the instance of the dissatisfied shareholders of a company, restrain further proceedings under an agreement to refer, entered into by two public companies, where the agreement is clearly *ultra vires*, and disputes have arisen thereunder which had been agreed to be referred to arbitration; and where directors of a company had affixed the company's seal to an agreement, part of which was *ultra vires*, Vice-Chancellor Sir W. P. Wood, at the suit of certain dissenting shareholders, declared the agreement, so far as it purported to bind the company to the clauses *ultra vires*, void; and as to such part as was declared void, restrained the other parties to the agreement from enforcing their rights (2). In this case an agreement had been made between two railway companies under their common seals, which contained clauses which were beyond the powers of the directors of one of the companies, and also clauses for referring to arbitration all disputes arising under the agreement; and the Court held that although a Court of Equity would, at the suit of a shareholder of that company, restrain both companies from proceeding to arbitration in respect of alleged breaches of those clauses, yet that no injunction would be granted at the suit of a shareholder of the other company, on the ground that the stipulations of any such clauses were beyond the powers of the directors of the company in which the plaintiff was not a shareholder (3). And agreements by a railway company to contribute towards the parliamentary deposit required by bills promoted by another company, or to take shares in future extensions of another company, or to make traffic regulations applicable to future extensions, are *ultra vires*; except the validity of such agreements is expressly made to depend on the sanction of Parliament.

The Court will restrain proceedings under an agreement to refer, clearly *ultra vires* between two companies, and will restrain the enforcing a part of an agreement *ultra vires*.

12. A public company exceeding its legislative limits cannot be

A public company exceeding-

(1) *Brett v. East India and London Western (Ireland) Railway Company, Shipping Company*, 12 W. R. 596. 1 H. & M. 130; 32 L. J. (Ch.) 513;

(2) *Maunsell v. Midland Great* 8 L. T. (N.S.) 347.

(3) *Ib.*

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ing its legis-
lative limits
cannot be re-
strained at
suit of a rival
company not
alleging
private injury.

restrained by injunction at the suit of a co-rival company, which does not allege that it has sustained some private injury by such excess, though the acts complained of may be injurious to the public interests; so held by Lord Chancellor Westbury, affirming a decision of Sir W. P. Wood on a demurrer (1).

The funds of
a company
established for
one purpose
cannot be
applied to
another.

13. The funds of a company established for the purposes of one undertaking, cannot be applied to another, and the attempt so to apply them, though sanctioned by all the directors, and by a large majority of the shareholders, is illegal. But where a company was established "for the erection, furnishing, and maintenance of an hotel, the carrying on the usual business of an hotel and tavern therein, and the doing all such things as are incidental or otherwise conducive to the attainment of the above objects;" and the directors built an hotel containing 360 rooms, but before it was opened, agreed to let off a portion of it unfurnished, and containing 169 rooms, to a government department (the India Board) for offices, at the rent of £6000 a year for a term of three years, with an option to the board to extend it to five years; and the company was to have the monopoly of supplying to the premises all provisions, wines, and liquors; and the directors also agreed to make alterations for that purpose, which it was estimated would cost about £2000, and cause a further expense in restoring the rooms to a state fit for hotel purposes; but it was established that this agreement was not entered into with a view to the permanent employment of part of the premises for purposes not authorized by the constitution of the company, but was adopted as an interim measure, because the directors believed that the whole of so large a building could not safely and advantageously be opened as an hotel at first, and because they had not capital to open the whole at once, and that a majority of shareholders had sanctioned the act; the House of Lords, affirming a decision of the Lords Justices and Vice-Chancellor Sir W. P. Wood, held that the agreement was not *ultra vires*, but within the words of the clause, "all such things as are incidental or otherwise conducive to the attainment" of the

(1) *Stockport District Waterworks Company v. Manchester (Mayor, &c.)*,
11 W. R. 156.

objects for which the company was established, and that the Court ought not to interfere (1).

14. Where a company had given notice to landholders to treat for certain portions of land, and, after some discussion, the question of compensation had been referred to arbitration, which, however, had not been completed; the Court held, that the remedy of the landowners was by mandamus, to compel the summoning of a jury, and not by bill in Chancery (2).

15. Where a plaintiff (a nurseryman) having a dwelling-house situate in a piece of ground $2\frac{1}{8}$ acres in extent, surrounded by brick walls, used part of the land as a nursery garden for trade purposes; he was held, by Vice-Chancellor Sir W. M. James, entitled to compel a railway company proposing, without actually touching the house, to take the greenhouses and a part which had been planted and used for ornamental purposes; to take the whole of the land (3).

16. Where a company had taken land not comprised in their notice to treat, and had erected works upon it, and the plaintiff claimed this land; but the claim was opposed by the company; and the plaintiff thereupon proceeded to interrupt and pull down some of the works commenced by the company; Vice-Chancellor Sir W. P. Wood held, that the remedy of the party should have been by ejectment, and that not having applied for an injunction to restrain the proceeding with the company's works he was not entitled to an injunction (4).

17. A creditor of a limited company, in course of being wound up voluntarily, may file a bill to have his claim declared valid, and to restrain the voluntary liquidators from expending the assets of the company in paying other debts of the same degree; and a plea to such a bill that, by the Joint Stock Companies Acts, 1856, 1857, and 1858, the cognizance of the matters in question belonged to the Court of Bankruptcy, was overruled by Vice-Chancellor Sir W. P. Wood, with costs (5).

A creditor of a limited company winding up voluntarily may file a bill to have his claim declared valid, and to restrain paying debts of same degree.

(1) *Simpson v. Westminster Palace Hotel Company*, 8 H. L. C. 712; 2 De G. F. & J. 141; 6 Jur. (N. S.) 747, 764, 985.

(2) *Lind v. Isle of Wight Ferry Company*, 7 L. T. (N. S.) 416.

(3) *Salter v. Metropolitan District*

Railw. Co., L. R. 9 Eq. 432; 39 L. J. (Ch.) 567.

(4) *Lind v. Isle of Wight Ferry Company*, 7 L. T. (N. S.) 416.

(5) *Lowndes v. Garnett and Moseley Gold Mining Company*, 2 J. & H. 282.

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18. It is highly inconvenient for the Court to grant an injunction to restrain the performance of works "in any other manner than authorized by the words of an Act of Parliament," unaccompanied by a statement of what, in the opinion of the Court, is the right mode of constructing those works (1).

19. Persons under disability served with a notice under the Lands Clauses Consolidation Act, 1845, to take part of a house and premises, are able to sell under the 92nd section of the Act, and may require the company to take the whole, although it may not fall within the limits of deviation of the railway (2).

20. Where a holder of 120 £20 shares in a company, having afterwards become entitled to sixty additional £2 shares, instructed his broker to sell the latter; and the broker obtained from him blank transfers with stamps sufficient to pass the £20 shares, and filled in the blanks for the descriptions of the shares, with those of the £20 shares, leaving the names of the transferees in blank; and the shares were purchased by jobbers, the blanks for the names of the transferees remaining in blank, which was a common course of dealing; and the jobbers afterwards sold them, and filled in the names of the ultimate purchaser; the Lords Justices held (affirming a decision of Vice-Chancellor Sir W. P. Wood) that the transfer in blank was void, that the first-mentioned holder was entitled to have the shares delivered up, and their registration in the names of the purchaser restrained (3).

21. Where a company had been incorporated according to the law of a foreign state, for purposes to be carried into effect within that state, but its principal shareholders were English, and its chief business was transacted in England, and the capital was divided into preferential and ordinary shares; and a resolution was passed by the shareholders that the managers should take the necessary steps abroad to increase the number of the preferential shares; the Lords Justices held (reversing a decision of Vice-Chancellor Sir J. Stuart) that, considering the domicile and purposes of the company, the holders of the ordinary shares had no equity

(1) *Dover Harbour (Warden and Assistants) v. London, Chatham, and Dover Railw. Co.*, 30 L. J. (Ch.) 474.

(2) *St. Thomas's Hospital (Governors)*

v. Charing Cross Railw. Co., 1 J. & H. 400.

(3) *Taylor v. Great Indian Peninsula Railw. Co.*, 4 De G. & J. 559.

upon the face of the bill to restrain the managers from applying to a foreign legislature for an alteration in their constitution (1).

22. Where a Court of Law, acting under the Joint Stock Companies Registration Act (7 & 8 Vict. c. 110), has given to one shareholder judgment against a company without assets, a Court of Equity will not prevent that judgment from being enforced against another shareholder, a Court of Common Law having full jurisdiction to deal with the case (2). In this case a shareholder of a company, who was also a creditor of the company, obtained a judgment against the company for money due; the assets of the company had been assigned to another company, of which he had not become a shareholder, and not being able to obtain payment of his debt he gave notice, under the 68th section of the above Act, to another shareholder in the first company, who had become a shareholder in the second company, that he should proceed against him individually to recover the debt. Upon a bill for an injunction by the shareholder so proceeded against, to restrain the proceedings at Law, but without asking for other relief; Vice-Chancellor Sir R. T. Kindersley held that a Court of Common Law had full jurisdiction to deal with the case, and refused an interlocutory motion for an injunction, with costs (3).

23. Where the Law has declared the construction of a contract, a Court of Equity will not interfere to aid either of the parties merely on the ground of their own or their agents' dealings under it, for that would be to make a new contract, which could only be done by mutual consent by persons properly authorized, and in due form (4). And if such dealings relate to a contract with an incorporated company, the new contract, like the old one, must be under seal (5).

24. Where a company had been registered under a memorandum of association, and incorporated under the 19 & 20 Vict. c. 47, as a limited company, for the purpose of conveying passengers and luggage in patent omnibuses, and the company had no special

(1) *Bill v. Sierra Nevada Lake Water and Mining Company*, 8 W. R. 205; 6 Jur. (N. S.) 184; 29 L. J. (Ch.) 176.

(3) *Ib.*

(4) *Irish Midland Great Western Railw. Co. v. Johnson*, 6 H. L. C. 798; 4 Jur. (N. S.) 643.

(2) *Hardinge v. Webster*, 1 Dr. & Sm. 101; 6 Jur. (N. S.) 88.

(5) *Ib.*

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articles of association; and a majority of more than three-fourths in number and value of the shareholders present at a general meeting duly convened passed a special resolution empowering the directors to borrow money at interest on debentures, for payment of debts contracted in the due working of the company, any sums not exceeding in the whole a certain amount, and some dissentient shareholders filed a bill on behalf of themselves and the other shareholders, except the directors, to prevent the issuing of debentures or other securities, whereby the stock and assets of the company might be charged or made liable for the payment of any money so borrowed for the use of the company, on the ground that such borrowing was *ultra vires*; the Court (Lord Justice Turner, affirming the decision of Vice-Chancellor Sir R. T. Kindersley, Lord Justice Knight Bruce, *dubitante*) held that such borrowing was an act for which a special resolution was a sufficient authority, and that the injunction ought to be refused (1).

25. Directors of a shipping company, with limited liability, established for purchasing vessels and running them between certain places, and for letting out the same ships, and generally to transact the business of shipowners, having power by the company's articles of association to do all such acts as the company might do, not being acts which the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), or the company's articles of association, required to be done by the company in general meeting, have power to borrow money for the purposes of the company, by mortgaging the company's ships, the power not being required either by the Act or by the articles to be exercised by the company in general meeting (2); and it is clear that with regard to everything that is within the powers of a joint stock company the majority of shareholders have power to deal with the assets of the company, and to bind the minority (3).

26. Where a charter of incorporation had been granted to a company on condition that no person should be admitted to the company's building or grounds on the Lord's Day in consideration

With regard to everything within the powers of a joint stock company, the majority of shareholders have power to deal with the assets and bind the minority.

(1) *Bryon v. Metropolitan Saloon Clipper Company v. Mounsey*, 4 K. & Omnibus Company, 3 De G. & J. 123; J. 733; 27 L. J. (Ch.) 729; 4 Jur. (N. S.) 1262. (N. S.) 1224.

(2) *Australian Auxiliary Steam* (3) *Ib.*

of any money payment, whether made directly or indirectly, unless the sanction of the Legislature should be obtained, and the company having obtained an Act of Parliament authorizing their directors to agree with the proprietors of any shares or stock for the conversion thereof into tickets of admission for life or years for such proprietor or his nominee, but providing that nothing therein contained should relieve the company from any condition contained in the charter; and advertisements were issued by the directors offering to accept the surrender of shares in exchange for tickets of admission for a term limited, to be made out to bearer, and to be available for Sundays as well as ordinary days; Vice-Chancellor Sir W. P. Wood, upon a demurrer and a motion for an injunction, held, that the admission of any person on a Sunday by means of such tickets as proposed would occasion a forfeiture of the company's charter; and, at the suit of a shareholder on behalf of himself and all other the shareholders against the company and directors, restrained the company from accepting a surrender of any shares in exchange for such tickets of admission (1).

27. Where there was a right of forfeiture of shares on giving ten clear days' notice, the Master of the Rolls, Sir J. Romilly, held, that a notice to forfeit "on Monday, the 9th of March next," was insufficient, the 9th being on a Friday; the day named in the notice being an impossible one, as the "9th of March next" did not fall on a Monday (2).

28. After a transfer of shares in a company has been made (by the rules of which no transfer was to be made until all arrears of calls had been paid), and after the recognition of the transferee by the company, the company cannot make any claims for calls due which ought to have been paid by the previous owner; neither can the company declare such shares forfeited on the refusal of the transferee to satisfy such demand, though he is only a mortgagee of the shares (3).

29. Directors will not be allowed to purchase the debt of a creditor and then sue a single unwilling shareholder in his name, Directors are not allowed to purchase the

(1) *Rendall v. Crystal Palace Company*, 4 K. & J. 326; 27 L. J. (Ch.) 397.

(2) *Watson v. Eales*, 23 Beav. 294; 26 L. J. (Ch.) 861; 3 Jur. (N. S.) 53.

(3) *Ib.*

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debt of a creditor, and then sue a single shareholder, so as to enforce contribution; but there must be no delay in coming for relief on the part of shareholder sued.

so as to enforce contribution (1). But where, in 1854, D. had been registered solicitor of a provisionally registered company, and in 1855 the company had been completely registered, and the plaintiff and five others were directors, and subscribed the deed for 1000 shares each, and D. subscribed for 500 shares; and by the deed 5s. deposit was to be paid on each share immediately, and the directors were to be indemnified out of that fund for all preliminary and other expenses; and only 240 shares, in addition to those subscribed for by the directors and their solicitor, were taken up, and the 5s. deposit on these was paid and expended; and the deposit on the shares of the directors (which would be £250 each) and of D. had never been called for; and in September, 1866, D. delivered his bill of costs to the plaintiff, with a demand of payment and a threat to sue; and on the 26th of October an action was brought; and on the 11th of November the plaintiff (the defendant at Law) obtained time to plead; but on the 14th of November he filed a bill for an injunction, and discovery of an alleged agreement by the solicitor only to charge costs out of pocket in case the company did not succeed, alleging besides that he had paid on account of the company as much in proportion as anybody else, and so much as to leave far less than the amount of the bill of costs due from him in respect of the deposit on his shares, and that D. had never paid his deposit, or in any manner contributed to the loss incurred; Vice-Chancellor Sir W. P. Wood held, that the creation of the indemnity fund having been waived by common consent, the plaintiff could not affect D. with fraud in that respect; and also, that the plaintiff had been too slow in coming for relief; and refused the injunction on both grounds (2).

30. Where A., a shareholder in a company, having held 500 shares, and, as he alleged, forfeited 490, had brought an action against the company for service, for a given sum, and the company had pleaded, but did not plead any set-off, and afterwards had withdrawn the pleas; and A. entered up judgment, and took out execution against B., one of the directors, who obtained time on giving a promissory note, and he alleged that at the time he gave it he did not know that A. was a shareholder, or had forfeited shares, and he alleged that A. was indebted on his 500 shares in

(1) *Beck v. Dean*, 3 Jur. (N. S.) 14.

(2) *Ib.*

more than the sum claimed, but he had signed a return, under the Registration Act, stating, among other things, that A. had held 500 shares, but had forfeited 490; Vice-Chancellor Sir R. T. Kindersley held, that he had no equity to restrain an action brought by A. on the promisory note (1).

31. Where a bill was filed by one of the shareholders of the Eastern Archipelago Company, which was incorporated by charter, alleging that the public purposes of the grantors of the lands and mines which the company held, and in furtherance of which the plaintiff had subscribed for shares, had not been fulfilled; and that such grants had been diverted in a great degree to private objects; and that the charter had been granted by the Crown on condition that a moiety of the capital should be subscribed for, and a fourth thereof paid up within a limited time, which condition also had not been fulfilled; and that having failed to fulfil such intentions and conditions, it was a fraud on the part of the directors to certify that they had been performed, and to commence the business of the company and make calls as they had done, and praying repayment of such calls, and an injunction to restrain the directors from making calls and carrying on business for the future, and an indemnity to the plaintiff; Vice-Chancellor Sir G. J. Turner allowed a demurrer by the company and directors to the bill. The Vice-Chancellor said, that either the plaintiff had or had not a common interest with all the other partners in the concern; that if he had a common interest with all the other partners, he must sue on behalf of himself and all those other partners, and that if he had not a common interest in the concern, those other parties must be represented upon this record, in order to contest and examine that question; and that he thought the plaintiff had constituted himself a member of the company, and that as a member of the company he could not have any part of the relief prayed, in the absence of the other members; and that it is no ground for relief in Equity at the suit of a shareholder against the company that the charter from the Crown, or the grant to the company from a private person, has been obtained by misrepresentation to the Crown or to such grantor; that it is for the Crown or the grantor, if either should complain of the fraud or misrepresentation, to take

(1) *Hammond v. Ward*, 3 Drew. 103.

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proceedings to set aside the charter or the grant; and that he did not find any sufficient allegation that the directors had fraudulently concealed, from the plaintiff alone, these facts, and that the plaintiff had been thus drawn into becoming a partner (1).

32. Where the directors of a provisionally registered company had purchased a lease of a mine for 2000 shares, to be considered as paid up, from the defendant S., acting on behalf of himself and the plaintiff, and the lease was assigned to trustees for the company, and 2000 free shares were allotted to S. in his own name; and the company was completely registered, but S. never executed the deed of settlement; or registered as a shareholder in respect of those shares; and S. had made advances on the shares for the plaintiff, and had brought an action for the same; on a bill by the plaintiff against S. and the company, for specific performance and delivery of sealed certificates, and to have the accounts between S. and the plaintiff, in respect of the advances, taken, and the action stayed, and also for an injunction to restrain any execution of the deed or registry as to these shares; the Court, overruling a demurrer by the company for want of equity, and for multifariousness, held that the company were bound to register and deliver sealed certificates to the plaintiff in respect of his 1000 shares, that the company were trustees for that purpose, and that the bill was not multifarious; and on motion for an injunction, it appearing that S. had refused to deliver to the plaintiff his shares, alleging fraud on the part of the plaintiff in the projection of the company, and that the mine was worthless, and that S. had exchanged the 2000 free shares for others, the Court granted an injunction (on payment of the balance of advances into Court) to restrain S. from executing the deed of settlement, or registering the 2000 shares, and to restrain the company from allowing any such execution or registry (2).

The provisional directors of a joint stock company will be restrained publishing without autho-

33. Where the provisional directors of a joint stock company had, without the authority of the plaintiff, published a prospectus stating him to be a trustee of the company, they were restrained by the Master of the Rolls, Lord Langdale, from so doing, on the ground that the plaintiff was exposed to risk by the act of the

(1) *Macbride v. Lindsay*, 9 Hare, 574.

(2) *Fyfe v. Swaby*, 16 Jur. 49.

defendants in using his name, and that money was placed in his name at the bankers of the company to the plaintiff's account as trustee, and that he was left to get rid of his responsibility as he could (1).

ity in a prospectus that the plaintiff is a trustee of the company.

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34. Where, before decree, a receiver was appointed over the assets of a company formed under the 6 Geo. 4, c. 42, which had stopped payment, the Court refused to restrain a creditor from suing out execution under the 18th section of that Act, against the shareholders, upon a judgment obtained against the company (2).

35. Acts of Parliament for making canals, railroads, &c., are powers given by Parliament over the land of the different proprietors through whose estates the works are to proceed. Each proprietor, therefore, has a right to have the power strictly and literally carried into effect as regards his own lands, and also has a right to require that no variation shall be made to his prejudice. But where the Act of Parliament is faithfully carried into execution as regards his own lands, he cannot on the mere ground of a variation which is not injurious to himself, and which was made with the consent of others, obtain from a Court of Equity an injunction to stay the proceedings (3).

Where an Act is faithfully carried into execution as regards a landowner's own lands, he cannot, on the ground of variation not injurious to himself, made with consent of others, stay the proceedings.

36. A Court of Equity will not, at the instance of a shareholder, restrain a joint stock company, incorporated by Acts of Parliament, which prescribe its constitution and objects, from applying in its corporate capacity to Parliament, and from using its corporate seal and resources to obtain the sanction of the Legislature to the remodelling of its constitution, or to a material alteration and extension of its objects and powers (4).

A Court of Equity will not, at the instance of a shareholder, restrain a joint stock company from applying to Parliament to remodel its constitution, or to extend its objects and powers.

37. Where at a meeting of a company regularly convened, resolutions were passed removing certain directors for misconduct, the deed of settlement of the company providing that such a meeting might remove any director for "negligence, misconduct in office, or any other reasonable cause," and other directors were subsequently elected in their place; and a bill was then filed by the removed directors to set aside the proceedings of the meeting, and

(1) *Routh v. Webster*, 10 Beav. 561.

(3) *Lee v. Milner*, 2 Y. & C. Ex. R. 611, 618.

(2) *Acheson v. Hodges*, Fl. & K. 371; 3 Ir. Eq. Rep. 516.

(4) *Ware v. Grand Junction Waterworks Company*, 2 Russ. & My. 470.

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the election of the new directors ; the Court held, on a motion to restrain the new directors from acting, that the expression, "reasonable cause," in the company's deed did not refer to such a cause as in a Court of Justice would be held reasonable, but only to such a case as should be deemed reasonable by the shareholders assembled at a meeting duly convened, and therefore that the Court had no jurisdiction to interfere ; nor, where no cause of direct fraud was proved, to determine whether the decision of the meeting had or had not been unduly influenced by unfounded statements made by parties taking an active part in the proceedings (1).

38. Where an individual shareholder in an insolvent joint stock company, being sued at Law by a banking firm, consisting of five partners, one of whom was also a shareholder in the company, for a debt due from the company to the bank, filed a bill against the plaintiff at Law, and all other the shareholders in the company, praying that the affairs of the company might be wound up, and that in the meantime the action might be stayed ; Lord Cottenham, overruling a decision of the Vice-Chancellor, allowed a general demurrer by the other four partners in the bank, on the ground that the relief prayed necessarily involved the winding up of the affairs of the bank as well as of the company, which if it had been specifically prayed would have rendered the bill multifarious (2). And the Lord Chancellor stated another objection to the bill, namely, that this Court was asked to restrain a creditor of a joint stock company from enforcing payment of his debt against an individual shareholder on the ground merely that the creditor was himself a shareholder, and therefore liable to contribute, and that such interference would defeat the rule at Law, which, for convenience, enables creditors of such companies to recover their debts by that form of proceeding, leaving them, of course, to their right to contribution against their co-partners.

39. *Semble*, 1. That a person who *de facto* is a partner, and who appears to be so on the books of the co-partnership, and whose name is registered as such, cannot discharge himself of his liability to creditors by shewing that the transfer to him was informally executed. 2. That the registry, here, of the name of the plaintiff,

(1) *Inderwick v. Snell*, 2 Mac. & G. 216 ; 2 H. & T. 412.

(2) *Rheam v. Smith*, 2 Ph. 726.

after the bank had stopped payment, as a partner concerned in the co-partnership, as the same appeared on the books of the company, was not authorized, here, even at Law, where he had ceased to appear as a partner on the books for seven years, and his name had been withdrawn from the register, and no new contract had been entered into with him, but entries merely had been made that the transfers by him were valid (1).

40. Where upon a suit by some partners in a joint stock banking company, on behalf of themselves and the other shareholders, to restrain a creditor of the company from suing the shareholders for a debt alleged to have been inequitably created, the common injunction had, under the old practice, been obtained to restrain the defendants from proceeding at Law against the plaintiffs touching the matters in question; Vice-Chancellor Sir J. Wigram held, that the common injunction in terms only protected the plaintiffs named on the record, and that therefore a proceeding by the defendants against the other shareholders, not individually named, was no breach of the injunction; that if the plaintiffs on the record could procure the other shareholders to submit to the same terms as they themselves must submit to, the Court would, on an interlocutory application by them, give the same relief or protection to the other shareholders as to them; but that, in the circumstances of the case, a special application was necessary to give the full benefit of the injunction to the shareholders not named on the record; and that for such purpose it was necessary to shew that such other shareholders stood in the same situation as the plaintiffs named on the record, but not necessary to shew that the other shareholders were, on the merits of the case, entitled to the injunction; and that it was competent to the defendants to shew any special circumstances which would make it unjust to extend the benefit of the injunction to the other shareholders (2).

41. Unless there is a case for the interference of a Court of Equity, the Court will not interfere in the internal administration of incorporated companies (3).

(1) *Taylor v. Hughes*, 2 J. & Lat. 24; 6 Ir. Eq. Rep. 480, 487. *pany of Copper Miners*, 2 Ph. 741; 1 H. & T. 85; *vide Foss v. Harbottle*, 2

(2) *Lund v. Blanshard*, 4 Hare, 290. Hare, 492; *Mozley v. Alston*, 1 Ph.

(3) *Lord v. The Governor and Com-* 800.

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A Court of Equity has jurisdiction to restrain a party from petitioning against a bill, where the right depends upon his private interest.

42. There is no question whatever as to the jurisdiction of the Court to interfere, where the right of a party to petition Parliament against a bill pending there, depends solely upon his having some private interest which is likely to be affected by it, and not as representing any interest of the public, or for the purpose of making any communication to Parliament; and this Court has the same jurisdiction to restrain him by injunction from petitioning against a bill in Parliament as it has to restrain him from bringing an action at Law, or from asserting any other right connected with the enjoyment of the property or interest which he claims (1).

43. Where it is clearly shewn that a public company is exceeding its powers, a Court of Equity will not refuse to interfere by injunction (2); though this must be taken as a general rule only, and does not apply where the damage is slight (3), or damages at Law are a sufficient and proper remedy (4), or the trespass is temporary (5).

44. Equity, in exercising its jurisdiction to prevent companies entrusted with large powers by the Legislature, acting in a manner prejudicial to the rights of individuals on the one hand, will, on the other, be careful not to assist persons in availing themselves of any omission in such powers for the purpose of giving effect to exorbitant claims against the companies (6).

45. Where it appeared that seven out of ten directors of a company were about to proceed in opposition to the wishes of a majority of the shareholders, as declared at a meeting, and a bill had been filed by the authority of the remaining three directors, on behalf of the company, to prevent the directors from so proceeding; on a motion to take the bill off the file, as filed on insufficient authority, the Court allowed the motion to stand over, in order to ascertain the sense of the shareholders as to the bill (7).

(1) *Stockton and Hartlepool Railw. Co. v. Leeds and Thirsk and Clarence Railw. Cos.*, 2 Ph. 666.

(2) *River Dun Navigation Company v. North Midland Railw. Co.*, 1 Railw. Cas. 135.

(3) *Warden of Dover Harbour v. South Eastern Railw. Co.*, 9 Hare, 497.

(4) *Turner v. Blamire*, 1 Drew. 409.

(5) *Standish v. Mayor of Liverpool*, 1 Drew. 1; *et vide Wood v. Charing Cross Railw. Co.*, 33 Beav. 290.

(6) *Bell v. Hull and Selby Railw. Co.*, 1 Railw. Cas. 616.

(7) *Exeter and Crediton Railw. Co. v. Buller*, 5 Railw. Cas. 211; 16 L. J. (Ch.) 449; 11 Jur. 527, 532.

And an injunction having been obtained to restrain the directors from so proceeding, and it appearing from the answer that the Act had been obtained for one object, which the seven directors were not proceeding to carry out, but that a majority of the shares having been purchased by new shareholders, who were alleged to be under the control of another railway company, the present majority of the shareholders had other objects, and opposed the proceedings of the seven directors, a motion to dissolve the injunction was refused with costs (1).

46. Where certain corporations were extinguished, and a new corporation formed of the old members and new members, and the debts of the extinguished corporations were made debts of the new corporation, and the directors made a call for payment of one of the liabilities of one of the extinguished corporations, a demurrer for want of equity by the company to a bill by some of the shareholders against the directors and the company disputing the right of the directors so to appropriate the call, was allowed (2).

47. A suit by individuals, shareholders of an incorporated company, is not maintainable where the plaintiffs have the means of procuring the institution of a suit for the same remedy in the name of the corporation; and this rule applies equally whether the subject of complaint be an act or transaction merely voidable at the discretion of a majority, or absolutely illegal, and incapable of being confirmed (3). And a general demurrer was allowed by the Lord Chancellor, (overruling a decision of the Vice-Chancellor,) to a suit by individuals against the corporation and twelve parties alleged to have usurped the office of directors, and to be acting injuriously to the interests of the company, praying that they might be restrained from acting as such, and to deliver the common seal, books, &c., to other parties, alleged to be the duly constituted directors. The Court will not restrain directors *de facto* from acting as such, on the sole ground of the invalidity of their title to the office (4).

A suit by individuals, shareholders of an incorporated company, is not maintainable where the plaintiffs can procure the institution of a suit in the name of the corporation.

The Court will not restrain directors *de facto* from acting, on the sole ground of the invalidity of their title to the office.

The Court will not allow

(1) *Exeter and Crediton Railw. Co. v. Buller*, 5 Railw. Cas. 211; 16 L. J. (Ch.) 449; 11 Jur. 527, 532.

way and Canal Company, 6 Railw. Cas. 136; 13 Jur. 443.

(3) *Mozley v. Alston*, 1 Ph. 790.

(2) *Cooper v. Shropshire Union Rail-*

(4) *Ib.*

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bodies having
parliamentary
powers of
making com-
pulsory pur-
chase of land,
to take land
not required
for a *bonâ fide*
purpose sanc-
tioned by their
Act.

given powers of making compulsory purchase of land to avail themselves of their parliamentary powers by taking land which they do not require for a *bonâ fide* purpose sanctioned by their Act of Parliament; and the Lord Chancellor, Lord Cottenham, said, that he thought it was the duty of every Court to keep such companies strictly within their Act of Parliament (1). But he said that although it might be the case that subsequent events had given the company a title which they had not in the beginning, yet, if it appeared that they had at the time of the application to the Court the right to take the land, he did not think the Court would interfere to prevent them exercising that right (2).

49. Where, by articles of association of a limited company, the plaintiff was appointed agent of the company in India, and it was provided that he was to take a number of the shares; and subsequently the directors persuaded him to resign, which he accordingly did, on condition that he should be freed from all liability on the shares, but they found afterwards that they could not legally carry out this condition; however, they insisted on dismissing the plaintiff, and brought an action against him for the amount due on the shares; upon a bill to restrain the dismissal of the plaintiff, or, in the alternative, the action, Vice-Chancellor Sir W. P. Wood held, on a motion for an injunction, that the company undertaking not to set up the voluntary resignation of the plaintiff in any proceeding which the plaintiff might commence at Law, the whole matter was one to be tried at Law, as the Court could not enforce the agreement as to the agency; the Vice-Chancellor said this Court could not compel an agent to fulfil his duties, and made no order on the motion (3).

50. By the memorandum of association of a limited company, registered before the passing of the Companies Act of 1862, it was declared that the nominal capital of the company should be £120,000, divided into 12,000 shares of £10 each; and, by a clause (the 72nd) of the articles of association, it was provided that the directors might, with the sanction of the company in general meeting, declare a dividend to be paid to the shareholders in propor-

(1) *Webb v. Manchester and Leeds Railw. Co.*, 4 My. & Cr. 116.

(2) *Ib.*

(3) *Mair v. Himalayan Tea Company, Limited*, 11 Jur. (N. S.) 1013; 14 W. R. 165.

tion to their shares; and the number of shares allotted was 5717; and afterwards, at an extraordinary general meeting, a resolution was passed purporting to enable the directors to issue part of the unallotted shares of the company, with a preferential dividend; and no special resolution, under the 12th or the 50th sections had been passed to alter the memorandum or articles of association; Lord Chancellor Westbury held, affirming the decision of Vice-Chancellor Sir R. T. Kindersley, that the resolution was *ultra vires*, and not binding on a dissentient shareholder. The power given by the Companies Act of 1862 (25 & 26 Vict. c. 89), s. 50, to a general meeting, by special resolution, to modify the regulations of the company, is limited to altering the regulations relating to the management of the company, and not to altering its constitution (1). And the Lord Chancellor said his then present impression was, that the 50th section of the Companies Act, 1862, even if it had been complied with in form, would not have empowered the company to have struck out this (the 72nd) clause of the articles of association, for the purpose of producing inequality amongst the original shareholders, the memorandum of association remaining unaltered; and the 12th section of the Act containing no power to alter the memorandum to the extent proposed (2).

51. The Court will not, upon an adjourned summons, give any direction to the official liquidator which will operate as an injunction to restrain a sale by a creditor holding securities of the company (3).

52. A statement true to the letter, but in substance a misrepresentation, put forward to mislead the public, is sufficient ground for cancelling an allotment to a person who has applied for shares on the faith of such statement. And where the prospectus of a company stated that more than half the shares issued had been subscribed for, and that the company had contracted for the purchase of two estates, upon one of which the vendor had expended a large sum in improvements; and in fact the chief promoter had agreed to take, by himself or his nominees, more than one half the number of shares issued, but he had before allotment carried such

A statement true to the letter, but in substance a misrepresentation put forward to mislead, is sufficient ground for cancelling an allotment of shares to a person applying on the faith of such statement.

(1) *Hutton v. Scarborough Cliff Hotel Company*, 11 Jur. (N. S.) 551, 849; 13 W. R. 631, 1059; 34 L. J. (Ch.) 643; 2 Dr. & Sm. 514, 521.

(2) *Ib.*

(3) *Xeres Wine Company, Limited, In re*, 14 W. R. 43.

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shares into the market, and the directors had not required him to perform his agreement; and the vendor to the company had not himself expended any sum in improvements on the one estate, though the person from whom he purchased had done so, and he had entered into merely a verbal contract for the purchase of the other estate; Lord Chancellor Cairns held, affirming a decision of Vice-Chancellor Sir W. P. Wood, that there were sufficient misrepresentations in the prospectus to entitle the plaintiff, who had filed his bill before any proceedings for winding up the company, to have the allotment of shares to him cancelled, to be repaid his deposit on the shares, to have his name removed from the register of shareholders, and to have an injunction to restrain an action for calls in respect of the shares (1). Where a person was induced to take shares in a company, on the faith of a statement in the prospectus as to the nature of a property contracted to be purchased, which statement the promoters had no reasonable ground for believing to be true, and which turned out to be untrue; and the articles of association, to which the shareholder was referred by the prospectus, gave power to the promoters to rescind the contract for purchase, and to acquire other property; Vice-Chancellor Sir W. P. Wood held, nevertheless, that a shareholder was entitled to an interlocutory injunction to restrain an action for calls, and without requiring the money to be brought into Court, although the directors had been themselves deceived, and had been guilty of no wilful fraud (2).

A person induced to take shares in a company upon the faith of a statement in the prospectus as to the property to be purchased, which turned out untrue, is entitled to an injunction to restrain an action on calls, though the directors themselves were deceived, and guilty of no wilful fraud.

53. A bill may be filed by depositors upon applications for shares in an abortive company, in which no allotment of shares has been made, on behalf of themselves and all the other depositors (3). But where deposits in respect of shares were paid into the company's bankers to the credit of the company, upon the faith of a prospectus which stated that the deposits would be returned if no allotment of shares was made, but no allotment was made, and the creditors of the company having brought actions in the Lord

(1) *Ross v. Estates Investment Company*, L. R. 3 Ch. 682; 37 L. J. (Ch.) 873; 36 L. J. (Ch.) 54; 16 W. R. 1151; 9 L. T. (N. S.) 61.

(2) *Smith v. Reese River Silver*

Mining Company, L. R. 2 Eq. 264; 12 Jur. (N. S.) 616; 14 W. R. 606.

(3) *Moseley v. Cressey's Company*, L. R. 1 Eq. 405; 12 Jur. (N. S.) 46; 14 W. R. 246.

Mayor's Court in which they sought to attach the money in the bank; and a bill was filed by three of the depositors, on behalf of themselves and all others having paid deposits on shares, to restrain the actions, and the creditors from attaching the moneys under a garnishee order, and to obtain a return of the deposits, alleging that they never formed part of the assets of the company; it was held by Vice-Chancellor Sir W. P. Wood, on demurrer, that the moneys having been paid to the credit of the company, there was no lien or trust in favour of the plaintiffs as against creditors of the company, that their proper remedy was by action against the provisional directors; but also, that the case, if sustainable, was a common one to all the depositors, and that therefore the plaintiffs could sue on behalf of all (1).

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54. The Court has not jurisdiction, upon an interlocutory application, to restrain the directors of a company by injunction from parting with moneys which *primâ facie* belong to that company, with which, by the articles of such company, the directors of the company have authority to deal, there being no admission of a trust; but the Court will decide those questions at the hearing of the cause. This was a suit on behalf of the plaintiff company praying relief on the footing that a payment for promotion money made by their directors to the defendant company was a breach of trust; and the motion was to restrain the defendants from dealing with the money or dissolving the company (a limited one being voluntarily wound up), which the Vice-Chancellor, Sir W. P. Wood, refused, on the grounds that the right to such money was the question to be decided at the hearing, and that there was no admission of a trust so as to entitle the plaintiffs to an order for payment of the money into Court (2).

The Court has no jurisdiction upon interlocutory application to restrain directors from parting with moneys *primâ facie* belonging to the company, with which, by the articles, the directors have authority to deal; there being no admission of a trust.

55. The Court will not interfere to prevent the directors of a limited company from commencing business, on the ground that all the nominal capital has not been subscribed for, nor on the ground that the business actually commenced is on a much smaller scale than that contemplated by the prospectus, there being in the bill no allegation of fraud, or of improper or *malâ fide*

(1) *Moseley v. Cressey's Company*, L. R. 1 Eq. 405; 12 Jur. (N. S.) 46; 14 W. R. 246.

(2) *Bank of Turkey v. Ottoman Company*, L. R. 2 Eq. 366; 14 L. T. (N. S.) 545; 14 W. R. 819.

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A payment of interest before profits have been realized out of capital is *ultra vires*, and will be restrained.

management (1). But a payment of interest to the shareholders before any profits have been realized, out of capital or borrowed moneys, even though made in pursuance of a resolution at a meeting, is *ultra vires*, and will be restrained by injunction, as being, in effect, a lessening of the capital to the prejudice of the creditors (2).

56. The Court will stay execution on a judgment obtained in an action brought after a resolution to wind up voluntarily, notwithstanding that the company defended the action (3). And in *M'Ewen v. London, Bombay, and Mediterranean Bank* (4), Vice-Chancellor Sir J. Stuart refused, pending the winding up of a company, to permit a suit, previously instituted for an account against the company and another defendant, to be proceeded with. And after a petition has been presented for the winding up of a company, the Court has jurisdiction, under the 85th section of the Companies Act, 1862 (25 & 26 Vict. c. 89), to restrain the sale by the sheriff of property of the company seized under a *fi. fa.* before the presentation of the petition (5). But an order to wind up a company is not in the nature of, nor has it the same effect as, an adjudication in bankruptcy (6). And where a *bonâ fide* creditor of a company obtained judgment in an action, and issued execution before the making of an order for winding up, the Court in the exercise of its discretion, gave him leave to put in force the execution after the order, notwithstanding sect. 163 of the Companies Act, 1862. The Vice-Chancellor, Sir W. P. Wood, said that sect. 163, making the execution void, was subservient to the power given by sect. 87 of giving leave for proceedings to go on (7). And where the liquidators of a company had brought an action against S., in which the defendant obtained judgment with costs; and S. was indebted to the company in a larger amount on a bill of exchange; and the costs of S.'s attorneys in the action being unpaid, they proceeded in his name to levy execution; and the execution had been stayed under an interim order in the winding-up, a sum being retained by the liquidators sufficient to meet the costs for which

(1) *Macdougall v. Jersey Imperial Hotel Company*, 2 H. & M. 528.

(2) *Ib.*

(3) *Sablionière Hotel Company, In re*, 15 W. R. 85.

(4) 15 L. T. (N. S.) 311.

(5) *Hill Pottery Company, In re*, L. R. 1 Eq. 649.

(6) *London Cotton Manufacturing Company, In re*, 12 Jur. (N. S.) 313.

(7) *Ib.*

the judgment had been signed; Lord Justice Cairns, reversing a decision of Vice-Chancellor Sir J. Stuart, held, that apart from the Companies Act, 1862, s. 163, there was at Common Law no right to set off the debt on the bill of exchange against the judgment; and that the solicitors had a lien on what could be recovered by the execution, and that they had the same right against the sum set apart, which represented the proceeds of the execution; and that if the Companies Act, 1862, s. 163, applied to such a case, and made the execution void (as to which His Lordship gave no opinion, but said he should be sorry to have to decide without very much more consideration) this Court would put the Defendant and his solicitors in the same position as if the execution had not been so restrained, and, therefore, that the solicitors must be paid their costs out of the sum set apart (1).

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57. Where A. filed a bill against B., the registered holder of 1000 shares in a company, and against the company and their secretary, for specific performance of an alleged contract by B. to transfer the shares to A., and for an injunction to restrain the company from transferring the shares to any one else than to A.; and the company thereupon filed a bill against A. and B., praying for declarations that the alleged contract was fraudulent and void, and that A. and B. were trustees of the shares for the company; Vice-Chancellor Sir W. P. Wood held, that the second suit was not so strictly in the nature of a cross suit to the first that A. was deprived of the right under the 69th section of the Companies Act, 1862 (25 & 26 Vict. c. 89), of calling upon the company to give security for costs (2).

58. Where persons have especial powers conferred on them by Parliament for effecting a particular purpose, they cannot be allowed to exercise those powers for any purpose of a collateral kind; therefore, a company authorized (making due compensation) to take compulsorily the lands of any person for a definite object may be restrained by injunction from any attempt to take them for another object. And where the Legislature has conceded power to a body of adventurers for a certain purpose (as, for example,

Persons having special powers conferred on them by Parliament for effecting a particular purpose cannot be allowed to exercise those powers for a collateral purpose.

(1) *Hindustan, China, and Japan, In re Bank of, Ex parte J. M. Smith*, L. R. 3 Ch. 125; 37 L. J. (Ch.) 185.

(2) *Washoe Mining Company v. Ferguson*, L. R. 2 Eq. 371.

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But the powers entrusted to an existing public body, such as a corporation of a city, for the purpose of improvements, will not be subject to a strict and restrictive construction.

the formation of a railway), such a body must shew some ground for the concession, and the Legislature has no concern with its means for obtaining the funds to carry its declared objects into effect, and in order to effect them it must not exceed the limits of its powers. But the case is different where an existing public body, such as the corporation of a city, is entrusted by the Legislature with the duty of making public improvements in its city, the powers thus entrusted to it for such a purpose will not be subject, as in the other case, to a strict and restrictive construction (1). Where, in 1862, an Act was passed authorizing the corporation of London to make a new street and take compulsorily certain lands (including the lands of the plaintiff), to raise money on the credit of it, and to sell superfluous lands; and shortly before the passing of this Act the corporation agreed with a railway company, which had no power to take the plaintiff's land, that if the Act passed the company would purchase certain lands under the Act, and sell for a certain price a specified part of them to the company, such part including the bulk of the plaintiff's lands, only a small portion of which was required to be thrown into the new street; and the corporation, after the passing of the Act, gave the plaintiff notice to take the whole of the land; the Lords Justices held, that the corporation had, by entering into the agreement, incapacitated themselves from forming a just judgment as between themselves and the plaintiff, concerning the quantity of his land which they should require, and—reversing a decision of Vice-Chancellor Sir W. P. Wood—that an injunction ought to be granted to restrain them from proceeding on their notice (2). But subsequently to this decision, and after notice had been given to take the land, an Act was passed which recited the contract with the company, and declared the company entitled to the benefit of it; and notice to take the land under this latter Act was given by the corporation to the landowner, but the notice expressly reserved to them all the rights under the former Act, the House of Lords, on a bill for an injunction to restrain the defendants from taking the lands under the last Act and notice,

(1) *Galloway v. London (Mayor, &c.)*, L. R. 1 H. L. 34; 11 Jur. (N. S.) 474; 12 Jur. (N. S.) 747.

(2) *Galloway v. London (Mayor, &c.)*, 2 De G. J. & S. 213.

and from carrying out the intended transfer to the railway company, or for any other purpose than the execution of the works authorized by the last Act, held, affirming the decision of the Master of the Rolls and the Lords Justices dismissing the bill, that the original contract was valid, and that this latter Act was a Parliamentary recognition of it. And Lord Chelmsford, upon the appeal to the House of Lords, said that he could not bring his mind to the conclusion that parties who are promoting a bill by which they seek to obtain certain discretionary powers over property may not enter into a conditional agreement that in the event of the bill passing into a law they will dispose of the property to be acquired in a particular way, without by this anticipation of the actual possession of the powers depriving themselves of all discretion to exercise them when obtained (1).

59. The books and papers of a company are the property of its shareholders, who are entitled to inspect them, though there is a secrecy clause in the articles of association, and though in the course of inspection they will become acquainted with matters which should be kept secret. But it is their duty not to divulge such information so acquired, and a Court of Equity will restrain them by injunction from so doing, and will punish them should they offend (2).

The books, &c., of a company are the property of the shareholders, who are entitled to inspect them, but they will be restrained divulging matters so discovered which should be kept secret.

60. Where a bill was filed against a company in liquidation to enforce an alleged lien for unpaid purchase money against the property of the company, part of which property consisted of fixed machinery and plant, an injunction was granted by the Lords Justices to restrain the official liquidator from selling that fixed plant and machinery (3).

61. Although a landowner will not in general be restrained from drawing off the subterranean waters in the adjoining land, yet he will be restrained if, in so doing, he draws off the water flowing in a defined surface channel through the adjoining land (4).

62. Where a local board of health are interfering with a water-course in a manner not authorized by the Local Government Act

(1) *Galloway v. London (Mayor, &c.)*, L. R. 1 H. L. 34; 11 Jur. (N. S.) 474; 12 Jur. (N. S.) 747. (2) *Ex parte Brinsley, Ex parte Buchan*, 36 L. J. (Ch.) 150. (3) *Blakeley v. Dent*, 15 W. R. 663.

(4) *Grand Junction Canal Company v. Shugar*, L. R. 6 Ch. 483.

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(21 & 22 Vict. c. 98), s. 68, art. 3, they will be restrained from so doing, and the person injured will not be left to his remedy under the compensation clause of the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 144 (1).

63. An unregistered company which has no power under its deed of settlement to sell or transfer its business to another company may, nevertheless, carry into effect an agreement for that purpose by registering under the Companies Act, 1862, then passing a resolution for voluntary winding-up, and directing the liquidators to carry out the agreement; so held by Lords Justices James and Mellish, affirming a decision of the Master of the Rolls, Lord Romilly, on a bill (which was dismissed) praying, *inter alia*, for a declaration that an agreement mentioned in the bill for the sale and transfer of its business from one company to another was beyond the powers of the company, and invalid and void, and for an injunction to restrain the carrying it into effect (2).

64. Upon a motion under the 4th section of 5 Vict. c. 5, *ex parte* on behalf of mortgagees of reversionary interests in a considerable amount of stock or shares in different railway companies, to restrain the several companies from permitting any transfer of any of such stock or shares until the further order of the Court, unsupported by any affidavit of special facts, and made by the mortgagees; Vice-Chancellor Sir J. Stuart restrained such companies until further order from permitting any transfer of such stock or shares; there was no question in dispute between any of the parties, and no intention of filing any bill (3).

65. When directors have acted on a void forfeiture of shares, the holder is entitled to an injunction restraining the directors from enforcing the forfeiture, and to a declaration that the forfeiture is void, and to have the same cancelled; and he may sue on behalf of himself and all other shareholders to obtain that relief (4).

66. Where a bill was filed by a shareholder of a company ordered to be wound up, against the company and the directors for a return of the sums paid by him in respect of shares, and to remove his

(1) *Grand Junction Canal Company Assurance Society*, L. R. 11 Eq. 65; 6 v. *Shugar*, L. R. 6 Ch. 483. Ch. 614.

(2) *Southall v. British Mutual Life* (3) *Re Locke and Others*, 18 W. R. 275.

(4) *Sweeney v. Smith*, L. R. 7 Eq. 324; 38 L. J. (Ch.) 446.

name from the list of shareholders, on the ground of misrepresentation in the prospectus, the directors having admitted that they were cognizant of the statements in the prospectus issued by their authority; Vice-Chancellor Sir W. P. Wood held that the statement in the prospectus was a clear misrepresentation, which overthrew the contract between the plaintiff and the company; and that, as the statement related to the directors' own acts, they must be fixed with a guilty knowledge of the misrepresentation. Since the filing of the bill, and the hearing of a motion for an injunction to stay proceedings in an action upon a call, the company had been ordered to be wound up; the Vice-Chancellor held that the plaintiff was entitled to repayment of £100, deposit and allotment money of the shares, (but without interest,) and costs, against the directors, and (notwithstanding the winding-up), against the company, to have his name removed from the register of shareholders, and to an injunction to restrain the company from taking further proceedings on the judgment, and from instituting any other proceedings against the plaintiff in respect of his having been a shareholder; with liberty to proceed as he might be advised in the winding-up matter in respect of the payment of his £100 and costs; and the costs of an application in the liquidation (in another branch of the Court) for leave to proceed in this suit were ordered to be included in the costs of the suit (1).

67. Under the City (London) Improvement Acts, 1847, the corporation is authorized to take certain lands, and the Acts provide that every person claiming compensation shall deliver a written account of his claim; and that, in the event of the corporation and the claimant not coming to an agreement, the Lord Mayor shall, in every such case, issue his warrant to the sheriffs to summon a jury to assess the compensation to be paid for either the entirety of the lands taken, or any share, estate, or interest therein, or charge thereon, "provided that in such inquiry the persons claiming compensation shall always be deemed to be the plaintiffs, and entitled to the same rights and privileges as plaintiffs in actions are entitled to;" the lessee of two houses had granted several under-leases of parts thereof, and the under-lessees had again granted inferior

(1) *Henderson v. Lacon*, L. R. 5 Eq. 328; *vide In re Reese River Company*, 249; 18 L. T. (N. S.) 527; 16 W. R. *Smith's Case*, L. R. 2 Ch. 604.

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interests; the Lord Mayor issued a warrant to the sheriffs to summon a jury to assess the compensation payable to the lessee and under-lessees, who were all named together in the warrant; Vice-Chancellor Sir G. M. Giffard held, upon the construction of sects. 20 and 21 of the City Improvement Act, 1847, that each claimant of a separate interest was entitled to have his compensation assessed separately, by a separate jury, from the claims of any other claimant; and that as this could not be done on the warrant issued, the Court would restrain the corporation from proceeding upon it, as exceeding its statutory powers (1).

68. A person seeking to set aside a voidable contract to take shares in a company, on the ground of misrepresentation, must take steps for that purpose immediately on discovery of the misrepresentation. And where, in June, 1865, shares in a company were allotted to the plaintiff; and towards the end of the year suspicions arose in his mind; and on the 30th of the following May he became fully aware that the prospectus, on the faith of which he had applied for the shares, contained misrepresentations, but he took no steps to repudiate the shares till the 21st of July; Lord Chancellor Cairns held, reversing a decision of the Master of the Rolls, Lord Romilly, overruling a demurrer, that the delay was such as to disentitle him to repudiate the shares, either as between himself and the creditors of the company, or as between himself and the other shareholders (2).

A company will be restrained employing its powers and funds contrary to its charter; such conduct is a breach of trust and a fraud on the part of the majority.

69. Where a corporation (*i.e.* an incorporated company) employs its powers and funds for purposes not within the scope of its charter, a stockholder may have a remedy by injunction. But, independently of its thus exceeding its powers, the will of a majority, properly expressed at a legal meeting, must control (3). Equity has jurisdiction against a corporation, (*i. e.* an incorporated company) when the money which should be divided among the stockholders has been applied contrary to the charter of articles of agreement. Such misapplication is held a breach of trust, and a fraud on the part of the majority towards the minority, who may have a remedy by

(1) *Abrahams v. London (Mayor, &c.)*, L. R. 6 Eq. 625; 37 L. J. (Ch.) 593.

732; 18 L. T. (N. S.) 811.

(3) *Giffard v. New Jersey, &c.*, 2 Stockt. 171 (Amr.)

(2) *Ogilvie v. Currie*, 37 L. J. (Ch.)

injunction; intentional wrong or actual fraud is not necessary to sustain such a bill (1).

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70. In an application for an injunction to restrain the holders of stock in a corporation (*i. e.* an incorporated company) from selling or transferring it, and from voting upon it at the next election of directors, which was to occur three days from the filing of the bill; it was held that the injunction should be granted for the former purpose, but not for the latter, as this might change the result of the election, and take from a majority of the legal stockholders the control of the company, without opportunity for a hearing (2).

SECT. 10. *Winding up Companies.*

1. Where a company, being equitable owner of a lease, continues after a winding-up order in the occupation of the leaseholds, and leaves goods upon the land, the landlord is not, by sect. 87 or sect. 163 of the Companies Act, 1862, prevented from distraining upon the goods of the company for rent accrued since the winding-up. And an order of the Master of the Rolls, Lord Romilly, refusing leave to proceed with a distress, was discharged by the Lords Justices James and Mellish, as well as an injunction granted on making the winding-up order, to restrain proceeding under the distress (3).

2. A vendor's suit was instituted against a company for specific performance, and an injunction obtained restraining an action to recover the deposit money paid on the contract. Interrogatories were filed, but before the answer was put in, the defendant, the company, was in course of voluntary winding-up under supervision; on a summons for leave to continue the suit, notwithstanding the winding-up, Vice-Chancellor Sir R. Malins gave leave to enforce an answer, but directed that no further proceedings should be taken without leave of the Court (4). The Vice-Chancellor, upon

(1) *March v. Eastern, &c.*, 43 N. H. 515 (Amr.) *pany, Ex parte Heaven*, L. R. 6 Ch. 462.

(2) *Hills v. Parrish*, 1 M'Cart. 380 (Amr.) (4) *Thames Plate Glass Company v. Land and Sea Telegraph Company*,

(3) *In re Lundy Granite Com-* L. R. 11 Eq. 248.

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a subsequent application, gave the plaintiffs leave to proceed; upon an appeal from this last order the Court of Appeal refused to interfere, on the ground that it was a matter left by the Legislature to the discretion of the Court below charged with the winding-up, and that it ought not to interfere with that discretion (1).

3. Where judgment was recovered on a promissory note given by a company, and a writ of execution issued, and sent to the sheriff by post; but before execution could be levied a petition was presented for winding up the company; on a motion by the official liquidator to stay further proceedings on the execution, Vice-Chancellor Sir R. Malins held, that under sect. 163 of the Companies Act, 1862, the execution was too late, and absolutely void (2).

4. The Court of Chancery has no jurisdiction to stay actions against the directors of a company being wound up by the Court. And where a compromise had been effected of certain claims by the contributories against the late directors of a company in the course of liquidation, and the compromise had been assented to by forty-nine out of fifty-one contributories, and had been sanctioned by an order of the Court; on a motion to stay actions commenced against the late directors by the two dissentient contributories pending an inquiry (which was also moved for) into the conduct of the directors; the Court held, that it had no jurisdiction to stay the actions (3).

5. Where it had been determined to wind up a company voluntarily by the usual resolutions, and a creditor brought an action against the company upon bills of exchange after notice of the resolutions; on a motion for an injunction under the Act, Vice-Chancellor Sir R. Malins made an order for payment by the creditor of the costs of the motion and action (4). Where, on the 13th of December, 1867, a resolution was passed to wind up a limited company voluntarily; and on the 16th of December a creditor marked judgment, issued a *fi. fa.*, and lodged the writ

(1) S. C., L. R. 6 Ch. 643.

(2) *In re London and Devon Biscuit Company, Limited*, L. R. 12 Eq. 190; 19 W. R. 943.

(3) *New Zealand Banking Cor-*

poration, In re, Ex parte Hankey, 39 L. J. (Ch.) 128; 21 L. T. (N. S.) 481.

(4) *East Kent Shipping Company, In re*, 18 L. T. (N. S.) 748.

with the sheriff, who was unable to seize any moveable goods, the company having closed the doors of their premises; and on the 27th of January, 1868, he advertised for sale by auction, on the 1st of February, the company's leasehold interests in the lands on which their buildings were erected; and on the 20th of December a petition was presented for winding up the company; and on the 28th of January, 1868, the Court ordered the voluntary winding-up to be continued under its supervision; it was held that the sale should be restrained, the execution creditors being secured priority for the full amount of their debt, with interest (1).

6. When an action brought by liquidators appointed in a voluntary winding-up under supervision fails, execution by the defendant for costs will not be restrained (2).

7. A limited company, which had been carrying on business with little more than one-fifteenth part of its stated capital, was sued by creditors for goods supplied to it, and, after vexatious delays in its defence to the action, to prevent judgment being signed, presented, by its own manager, a petition to wind up; the sheriff entered under a *fi. fa.* two days after the petition was presented, but was restrained from selling by an *ex parte* injunction, obtained on a second petition to wind up, presented the day after he had entered, by the company's clerk; on motion by the creditors to discharge this injunction, the Court, in the exercise of its discretion, discharged the injunction with costs (3).

8. Where a suit is instituted by a shareholder in a company to restrain that company from amalgamating itself with another company, which since the resolution for amalgamation is ordered to be wound up, the Court will, on summons, give leave to the plaintiff to proceed with the suit on his undertaking not to enforce any decree which he may obtain without the leave of the Court (4).

(1) *Dublin Exhibition Palace Company, In re*, 2 Ir. Eq. Rep. 158. *Coal Company, In re*, 37 L. J. (Ch.) 517; 16 W. R. 689; 18 L. T. (N. S.) 390.

(2) *Levick, Ex parte*, L. R. 5 Eq. 69; 17 L. T. (N. S.) 237.

(3) *Imperial Steam and Household*

(4) *Marine Investment Company, In re*, 18 L. T. (N. S.) 535.

CHAPTER VIII.

JURISDICTION.

PART I.

The Court has no jurisdiction on a contract, as against a foreign sovereign; nor over the sovereign acts of a foreign government; nor over the prerogative rights of a foreign sovereign; nor against parties claiming under an act of sovereign prerogative.

An English Court has no jurisdiction to enforce contracts of a foreign government against the property of such government in England.

1. The Court has no jurisdiction on a contract as against a foreign sovereign, and it has none as against other parties in favour of whom it is alleged the sovereign has committed an act in derogation of rights and privileges already granted to another party; nor has the Court jurisdiction to interfere with the sovereign acts of a foreign government, nor with the prerogative rights of the sovereign of another country; therefore in the case of two inconsistent grants of the same subject matter by the same foreign sovereign authority, the Court cannot aid parties claiming under the first grant, against claimants, though within the jurisdiction, acting under the second. And where a bill was filed against the Ottoman Bank, its directors, and the Sultan of Turkey, which alleged that the Sultan's government had granted to the plaintiffs, the Bank of Turkey, the exclusive right of issuing paper money and bank notes in Turkey, and had subsequently, before the Bank of Turkey had commenced business, in derogation of that grant, made a similar concession to the Ottoman Bank, and prayed a declaration of the plaintiffs' exclusive right, and an injunction against the Ottoman Bank and its directors; Vice-Chancellor Sir W. P. Wood allowed a demurrer to the bill on the part of the bank and directors, on the ground that as the Court has no jurisdiction on the contract against the Sultan, it had none against the bank and directors (1). An English Court has no jurisdiction to enforce the contracts of a foreign government against the property of such government in England; and where the government of a state contracts a loan in another country, the contract is governed by the law of the state whose government contracts the loan, and not by the law of the country in which the

(1) *Gladstone v. Ottoman Bank*, 1 H. & M. 505; 9 Jur. (N. S.) 246.

contract is made; therefore where, by a convention between the government of Peru and a Peruvian company, all guano to be exported from Peru to Great Britain and Ireland was consigned to the company, and it was agreed that the company should sell the guano and hold a certain portion of the proceeds at the disposal of the government; and the Peruvian government afterwards contracted a loan in England upon the terms that all the Peruvian guano to be imported into Great Britain and Ireland and Belgium should be hypothecated for the repayment of the loan, and that out of the proceeds of the guano a certain sum should be applied half yearly in redemption of the loan; the Master of the Rolls, Lord Romilly, held, in a suit by the bondholders of the loan (to which the Peruvian government was made a defendant, but did not appear) that the Court had no jurisdiction to restrain the company or their agents from applying the proceeds of the guano in the hands of the agents in England to any other purpose than the redemption of the loan (1). Although the Courts in this country cannot make an order against a foreign ambassador who does not submit himself to the jurisdiction, yet the Court has jurisdiction, in a suit by an English citizen against another English citizen in whose hands a fund is placed, subject to the sole control at law of a foreign ambassador or government, to restrain the defendant from parting with the fund upon the order of such foreign ambassador or government; and the existence of a contingent right in a foreign sovereign to a fund in the Bank of England will not prevent the Court from exercising jurisdiction to restrain the bank from parting with the fund until the determination of the question between the British subject and the foreign sovereign as to the right to the fund (2).

The Courts in this country cannot make an order against a foreign ambassador not submitting to the jurisdiction; but in a suit between two English citizens, the Court can restrain defendant parting with a fund subjected to the control of a foreign ambassador or government, upon the order of that foreign ambassador or government.

2. The Court being informed by counsel that A. is an ambassador, duly accredited from a foreign sovereign to the British court, will dismiss him from the suit, and will not, if he object, oblige him to plead or take part in any proceedings (3).

The Court will dismiss a foreign ambassador from the suit, and not oblige him to plead, &c.

3. If the Court is of opinion that there has been acquiescence,

Proceedings in Chili for an

(1) *Smith v. Weguelin*, L. R. 8 Eq. Jur. (N. S.) 71; 32 L. J. (Ch.) 155; 198; 17 W. R. 904; 38 L. J. (Ch.) 11 W. R. 180.
465; 20 L. T. (N. S.) 724.

(2) *Gladstone v. Musurus Bey*, 9 W. R. 180.

(3) *Gladstone v. Musurus Bey*, 11 W. R. 180.

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account,
restrained
(here) on the
ground of
acquiescence,
&c.

it will restrain a party from proceeding in a foreign country to compel an account. And where, in 1825, C. died in Arequipa, intestate, leaving real and personal estate at Valparaiso, in Chili; and his mother and three brothers, B., T., and H., survived him, and they all resided in England, except H., who at the time of the death of C. was in Peru, and who for many years subsequently resided either in Peru or in Chili, but without acquiring a foreign domicile; and in 1831 their mother died, having bequeathed all her property to her sons, B., T., and H., equally; and in 1832 T. offered his share of C.'s estate to H. for £1000, and H., in reply, intimated that, with a view to save the expense of rendering formal accounts of C.'s estate, he was willing to buy the shares of both B. and T., which led to a long correspondence; and in 1833 B. wrote to H. offering his share for £1100, to be paid in part out of the mother's estate, but by a given date; and T. wrote to H. at the same time, saying, whatever B. determined would meet with his approval; but the condition as to payment by a given time was not fulfilled; however, in the subsequent correspondence between B. and H. the arrangement was treated as binding between them, and was never repudiated by T., nor were any accounts of C.'s estate applied for until after B.'s death, which occurred in 1849; and in 1850 T. sent an agent to Valparaiso, who, on behalf of T. and the representatives of B., took proceedings in the Courts in Chili; and in 1858, by a decree made in the Court at Santiago, it was decided that the letters between the brothers amounted to an agreement which bound B., but not T.; and H. was directed to account to T. for one-third of C.'s estate; upon a bill in this country by H. and the assignee under his insolvency, the Master of the Rolls, Sir J. Romilly, held, that, having regard to H.'s avowed object in purchasing both shares, and T.'s acquiescence from 1833 to 1849, T. was bound equally with B., and restrained the proceedings in Chili, and declared T. a trustee of his share in the estate of C. for the plaintiffs (1).

The Court has jurisdiction to entertain a bill at suit of commissioners

4. The Court of Chancery has jurisdiction to entertain a bill at the suit of the commissioners of sewers, appointed under 23 Hen. 8,

(1) *Cood v. Cool*, 33 Beav. 314; 9 Jur. (N. S.) 1335; 33 L. J. (Ch.) 273; *et vide Norris v. Chambres*, 3 D. F. &

J. 583; 7 Jur. (N. S.) 59, 659; *Ex-Rajah of Coorg v. East India Company*, 29 Beav. 300.

c. 5, notwithstanding that such commissioners are a Court of record (1).

of sewers appointed under
23 Hen. 8, c. 5.

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5. The Court has no power to restrain British subjects from doing in a foreign country whatever they are authorized to do by the sovereign power there (2).

6. Where B., who was held by the Scotch Courts to have been a domiciled Scotchman, had died in England, and his executor and universal legatee had obtained probate in Scotland, and he also sought to obtain probate in England; but the will was disputed by B.'s next of kin, and there was an agreement to compromise the matter, but it eventually failed, and the executor's application to procure the seal of the English Probate Court was unsuccessful, and the next of kin had filed a bill for administration in England and Scotland, and for a receiver, and obtained an order to serve the executor with a copy of the bill, on which was indorsed an order for a receiver, and an injunction in Scotland; on a motion by the executor to discharge this order, on the ground that the jurisdiction was in England, the Court held that the executor ought not to have been so served, and that the order for service as to the receiver and injunction must be discharged, but not as to service of a copy of the bill, the next of kin having consented, at the request of the executor, to enable him to get the seal affixed in the English Probate Court (3).

7. By 18 & 19 Vict. c. 63 ("An Act to consolidate and amend the Law relating to Friendly Societies"), disputes are, by sect. 41, to be referred to the County Courts, which are to make such orders as the Court of Chancery may make; but in Scotch friendly societies the jurisdiction is given to the sheriff; some members of a Scotch society having sought relief before the sheriff, the defendants pleaded to the jurisdiction, whereupon the sheriff directed a case to the Court of Chancery, under 22 & 23 Vict. c. 63 ("An Act to afford Facilities for the more certain Ascertainment of the Law administered in one Part of Her Majesty's Dominions when pleaded in another Part thereof"), to ascertain whether that Court had

(1) *Crossman v. Bristol and South Wales Union Company*, 1 H. & M. 531. (2) *Gladstone v. Ottoman Bank*, 9 Jur. (N. S.) 246.

(3) *Hawarden (Viscountess) v. Dunlop*, 7 L. T. (N. S.) 237.

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jurisdiction in such a case in England ; but the Court held that the case did not come within the latter statute, and declined to express its opinion (1).

The sovereign of a foreign state may sue to prevent the issuing of monetary notes, if injury will accrue thereby to the property of the foreign state or subjects.

8. The Court of Chancery has no jurisdiction to interfere merely with a view to prevent revolution ; it is only to prevent an injury to property that its aid by injunction can be invoked. And the actual reigning sovereign of a foreign state, in amity with Great Britain, is entitled to sue in this Court, and to obtain an injunction to prevent the issuing of monetary notes manufactured in England, purporting to be notes of that foreign state, but having no sanction from its government, if the Court is satisfied that some substantial injury will thereby accrue to the property of such foreign state, and to that of the plaintiff's subjects, whom he has a right to represent ; accordingly, monetary notes having been manufactured in this country, purporting to be sanctioned by the state of Hungary, and signed by K., a native of Hungary, resident in England, "in the name of the nation," but which were unauthorized by the existing government ; an injunction was granted to restrain their issue, and they were ordered to be delivered up to be cancelled, at the suit of the Emperor of Austria, as king, *de facto*, of Hungary (2). Where a government, formed during a revolution in Sicily, seized upon the king's treasure, and remitted part of it to persons in this country to purchase steamships, and they applied the remittance accordingly ; upon a demurrer to a bill filed by the king, Vice-Chancellor Sir L. Shadwell held, overruling the demurrer, that the king, who had re-established his authority, was entitled to sue for one of the ships which remained in the port of London ; and also that the persons that made the remittance were not necessary parties to the suit (3). The Vice-Chancellor said that it appeared to him extraordinary, after the cases of *The Nabob of the Carnatic v. The East India Company* (4), and *The King of Spain v. Hullett* (5), that there should be any difficulty raised upon the proposition ; because it seemed to his mind to be laid as clear as any proposition could be, that the indepen-

The independent sovereign of a state can sue for his personal rights in this country.

(1) *Brodie v. Johnson*, 30 Beav. 129.

(2) *Emperor of Austria v. Day and Kossuth*, 9 W. R. 712, 568 ; 7 Jur. (N. S.) 639 ; 2 Giff. 628.

(3) *King of the Two Sicilies v. Willcor*, 1 Sim. (N. S.) 332.

(4) 1 Ves. Jun. 371.

(5) 1 Bli. (N. S.) 31.

dent sovereign of a state is competent in this country to sue for his personal rights.

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9. Where the Court of Chancery had appointed a guardian, and settled a scheme for the education of an infant peer, who was entitled to large estates in England and Scotland, it restrained the tutor dative from continuing proceedings in the Court of Session (Scotland) relative to the education and residence of the infant, and as to his English estates, which had been instituted in Scotland, so as to supersede the scheme approved of by the Court of Chancery (1).

Tutor dative restrained (here) continuing proceedings in Scotland.

10. The Court will not in general restrain, nor is it its practice in general to restrain, parties from applying to the legislature, whether of this or of a foreign country; and where a foreign company had been formed in California, for purposes connected with land in that country, but the company was located in England, and nearly all the shareholders were resident in England, and a resolution had been passed at a meeting of English shareholders authorizing the trustees to take steps for increasing the preference shares to an extent not allowed by the existing constitution of the company, but there was no intention to create preference shares except with the sanction of the Californian legislature, the Court refused an injunction to restrain the company from acting on the resolution, and from applying to the legislature of the foreign country (2). And in *Lancaster and Carlisle Railway Company v. North Western Railway Company* (3), applications to Parliament on public and on private grounds were distinguished, and it was held that the latter may in a proper case be restrained, but that the former cannot, in any case, be restrained by injunction; and although the Court has undoubted jurisdiction to prevent the breach of an agreement not to apply for an Act of Parliament, yet where the agreement was not to apply to Parliament for a measure affecting the public benefit, Vice-Chancellor Sir W. P. Wood declined to interfere, but said that he did not think it necessary to express an opinion on the question, whether the contract were void

The Court will not (in general) restrain parties applying to any legislature;

but in a proper case, applications to Parliament on private grounds will be restrained—but applications on public grounds will not be restrained.

(1) *Bute (Marquis) v. Stuart*, 2 Giff. 582; affirmed on appeal, *sub. nom. Stuart v. Moore*, 4 Macq. H. L. Cas. 1; *vide* S. C. p. 1065, *post*.

(2) *Bill v. Sierra Nevada Lake Water and Mining Company*, 1 De G. F. & J. 177; 6 Jur. (N. S.) 184.

(3) 2 K. & J. 293; 25 L. J. (Ch.) 223.

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in itself on grounds of public policy, and he left it to be determined when occasion might require its determination. And where the defendants (a railway company) had agreed with the plaintiffs (also a railway company) not to apply to Parliament to make any line, or branch line, connecting the defendants' with the plaintiffs' railway, except a certain main line and branches, and certain deviations, for which application had been made to Parliament by the defendants; and in consideration of the premises the plaintiffs, who had previously opposed, agreed to support the defendants' application, and, if required, to petition Parliament in its favour, and the plaintiffs had performed their part of the agreement, and the defendants had obtained their Act; the Court refused to restrain the defendants from applying to Parliament for power to make a further deviation, on the ground that the bill, if passed, would be passed on public grounds, which this Court could not try, and with full knowledge of the agreement; while, if rejected, the inconvenience of opposing the bill would be compensated in damages for a breach of the agreement, assuming the agreement to be legal. And a Court of Equity has jurisdiction, if a proper case connected with private property or interest be made, to restrain a party by injunction from petitioning against a bill in Parliament (1). In this case the defendants had agreed not to oppose a certain bill before Parliament, and afterwards attempted to oppose it, and the Vice-Chancellor, and, on appeal, the Lord Chancellor, held, that there was no doubt on the subject as to jurisdiction, and granted an injunction.

A Court of Equity has jurisdiction to restrain petitioning Parliament in a case connected with private property.

The judgment of a foreign Court is examinable, where the proceedings do not amount to a judgment *in rem*, but in *in personam* only, and the party has not intervened to defend his rights.

11. Where the proceedings in a foreign Court do not amount to a judgment *in rem*, but *in personam* only, and a party has not been concluded by having intervened to defend his rights in a suit, nor has his conduct amounted to a selection of a foreign jurisdiction by the plaintiff, the judgment of the foreign Court is examinable (2). So held (overruling a demurrer) in a case where a British ship had been duly mortgaged in England, and afterwards she went to New Orleans, and was attached by creditors of the mort-

(1) *Stockton and Hartlepool Railw. Co. v. Leeds and Thirsk and Clarence Railway Companies*, 2 Ph. 666; 5 Railw. Cas. 691, 695.

(2) *Simpson v. Fogo*, 1 J. & H. 18; 1 H. & M. 195; 6 Jur. (N. S.) 949; 29 L. J. (Ch.) 657; *vide ante*, p. 392.

gagor, who had become insolvent; and the mortgagee intervened in the suit, but the Court there wholly disregarded his title, the law of Louisiana not allowing mortgages of chattels; the ship had been sold under a decree of the Court there to the defendant; and, having been brought to England, the mortgagee had filed a bill to establish his claim; the Court—Vice-Chancellor Sir W. P. Wood—held, that the proceedings in Louisiana were not *in rem* but *in personam* only, and that the mortgagee was not concluded by having intervened in the suit to defend his rights, and that the judgment was examinable; and also, that whether the Court of Louisiana had refused to hear the mortgagee, or whether it had heard him, and proceeded on the principle of disregarding the *lex loci contractus* in adjudicating on his claim, there would in either case be such plain and manifest error on the face of the judgment that an English Court would not be bound to recognise it (1).

12. In *Maclaren v. Stainton*, *Maclaren v. The Carron Company* (2), Lord Chancellor Cranworth said, that he conceived that it must be a very strong case which would justify the Court in restraining a foreigner, domiciled in another country, from proceeding to obtain payment of debts according to the law of the country in which he was domiciled. After a decree in England for the administration of an English testator's estate, a Scotch company, whose *situs* was in Scotland, but which had agents and houses of business in England, commenced proceedings against the representatives in Scotland, where the testator possessed real and personal estate, to recover a debt claimed against the testator as their agent, an injunction which had been granted by the Master of the Rolls to restrain the proceedings in Scotland (3), on appeal, was discharged by the House of Lords (4). After this the company commenced another action in Scotland, and a motion was made to restrain it, on the ground of the company having come in and adopted the proceedings in England, but the application was refused by the Master of the Rolls, and by the full Court

(1) *Simpson v. Fogo*, 1 J. & H. 18; 1 H. & M. 195; 6 Jur. (N. S.) 949; 29 L. J. (Ch.) 657; *vide ante*, p. 392.

(2) 26 L. J. (Ch.) 332.

(3) *Maclaren v. Stainton*, 16 Beav. 279; *vide* S. C. p. 1055, *post*.

(4) *Carron Iron Company v. Maclaren*, 5 H. L. C. 416.

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of Appeal (1). Where a person domiciled abroad left personal estate both in a foreign country (Madeira) and in England, his administratrix, having taken out letters of administration in both countries, and being under a bond to the foreign Court properly to manage the English property, will not be restrained at the suit of a mortgagee in England of part of the foreign property from transmitting the English personalty to the foreign country; Lord Abinger, C.B., said, "he must take for granted that the Court in Madeira would do justice as well as the Court here" (2).

If the property
is *in medio*
the Court will
interfere.

13. It is a matter of discretion for the Court of Chancery whether it will or will not interfere by interim order respecting the property of a litigant. If the property is *in medio* (in the actual enjoyment of no one) the Court will interfere for the benefit of all concerned (3).

14. Where the plaintiff, W. A., a domiciled Scotchman, through his stockbrokers in England, had had various transactions for the feigned purchase and sale of shares and stock in railway and other companies, but it was never intended that they should be completed by delivery of the stock, being merely time bargains—a gambling for differences between the prices at which the shares or stock were nominally purchased and sold;—and the brokers had obtained from W. A. a deposit of certain shares as security for any balance which might be due to them, and had also stipulated for a bond or judge's order, both in England and Scotland, as a further security, and the Defendants had rendered an account, and then had sold the deposited shares; but as the proceeds did not discharge the balance due to them, they had brought an action against him in the Sheriff's Court in Scotland for the balance, and had arrested his goods there, and a commission had been issued for the purpose of taking evidence in England; and W. A. then filed his bill in England, asking discovery; and for an account, and for an injunction to restrain the defendants from proceeding with the action in Scotland, at the same time offering to pay what was due, and submitting all his property in Scotland, subject to the arrestments, to the jurisdiction of this Court; upon a general

(1) *Stainton v. Carron Company*, 21 Beav. 152.

(2) *Wallace v. Campbell*, 4 Y. & C. 167.

(3) *Owen v. Homan*, 4 H. L. C. 997; 17 Jur. (N. S.) 861.

demurrer to the bill, the Master of the Rolls held, that the illegality of the transaction could not be then considered; that it was no ground for stopping the proceedings in a foreign Court; that from the allegation that evidence of the transactions could not, by the law of Scotland, be received in the Sheriff's Court from the plaintiff and the defendants, there was ground to suppose that complete justice could not be done there, and the demurrer was therefore overruled, and the costs made costs in the cause (1). In *Jones v. Geddes* (2), an injunction granted, on a suggestion of fraud, to restrain the prosecution of a suit in Scotland to enforce a real security, was afterwards dissolved, notwithstanding the remedy in cases of fraud might be more effectual than in the Court of Session, the question on the whole being likely to be more conveniently litigated and concluded there than here. But in *Bunbury v. Bunbury* (3) an injunction was granted on terms, to restrain proceedings instituted in Demerara to recover real estate there, and an order made for a consignee and manager of the estate and produce; it appearing to the Court that there were many other questions between the parties, connected with the estate, which could be more conveniently determined together in this country. Where the next of kin of an intestate filed their bill in Equity in the Supreme Court of Newfoundland, against A., the brother and deceased partner of the intestate, for an account of the estate of the father of A. and of the intestate, possessed by A., and an account of the partnership transactions, and the dealings of A. with the estate since the death of the intestate, and the bill was taken *pro confesso* against A. in the Colonial Court; and on a reference the Master reported that several sums were due to the several next of kin on the account of the estate of the intestate's father possessed by A., but that no account between A. and the intestate had been laid before him; and the Supreme Court decreed that the sums found by the Master to be due to the next of kin, and the costs, should be paid to them by A.; and the next of kin brought their actions in this country against A. upon the decree, and A. then filed his bill in this Court against the next of kin and personal representative of the intestate, stating that the intestate's

The Court will restrain proceedings in a foreign country if there are questions which could be more conveniently determined here. The Court refused to interfere on the ground of error or irregularity, the Privy Council having jurisdiction, in the event of an appeal, to stay execution of the decree.

(1) *Ainslie v. Sims*, 23 L. J. (Ch.) 161.

(2) 1 Ph. 724; *vide* S. C. p. 1056, *post*.

(3) 1 Beav. 318; *vide* S. C. p. 1063, *post*.

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estate was indebted to him on the partnership accounts and on private transactions, and alleging various errors and irregularities in the proceedings in the Supreme Court, and that A. intended to appeal therefrom to the Privy Council, and praying that the estate of the intestate might be administered, the partnership accounts taken, the amount of the debt due to A. ascertained and paid, and the next of kin restrained by injunction from proceeding in their action; Vice-Chancellor Sir J. Wigram allowed a demurrer for want of equity, on the ground that the whole of the matters were in question between the parties, and might properly have been the subject of adjudication in the suit before the Supreme Court of Newfoundland; that inasmuch as the Privy Council is the Court of Appeal from the colonial Court, and has jurisdiction to stay the execution of the decree pending the appeal, the Court will not interfere by injunction on the ground of error or irregularity in the decree of the Colonial Court. The Vice-Chancellor said that without giving any opinion upon the question, whether charges (in the bill) shewing that the proceedings in a foreign Court were altogether null and void, as being against natural justice, would or not, upon general demurrer, have been treated as null, and have sustained the bill as to the whole of the relief prayed, he had no doubt that mere irregularity in the proceedings was insufficient for that purpose, in a case in which an appeal lies from the colonial Court to the mother country, and there is a tribunal competent to reform the errors of the Court below, and even to suspend the execution of the decree pending the appeal, if justice required that it should be suspended; and he said that the conclusion to which he must come, in a case where relief was sought in this Court in consequence of errors and irregularities in the decree of a colonial Court, and an appeal lies from that decree to the appellate jurisdiction in this kingdom, was to allow the demurrer; but he said that he did not say that his conclusion would have been the same if the proceedings which were impeached had taken place in a foreign Court from which there was no appeal to any superior jurisdiction which a Court of Equity in this country could regard as certain to administer justice in the case; but that he expressed no opinion on that point (1). And where Courts of Scotland have

(1) *Henderson v. Henderson*, 3 Hare, 100.

power to preserve property *pendente lite* instituted there, this Court has no jurisdiction to that end (1). On a bill for a partition of lands in Ireland, and an account of waste committed there, a demurrer was allowed as to the partition, but overruled as to the account (2). And in *Kennedy v. Cassillis (Earl of)* (3) an injunction to restrain proceedings in the Court of Session in Scotland was, under the circumstances, dissolved; the Lord Chancellor (Lord Eldon) said that he could not doubt that the Court (*i.e.* of Chancery here) had jurisdiction; but that that would not authorize him in restraining another Court of competent jurisdiction, *i.e.* restraining persons from prosecuting proceedings in that Court. But he said, whether the property was to be administered according to English or Scottish notions of Equity (which he said in many material points differed) must depend, when the cause was heard, on the national character of the individuals, and the character of the property which the decree affects. Though there is jurisdiction in this Court upon a contract concerning an estate in a colony, yet where the question, upon the construction of the contract for a security by way of mortgage, had been before a Court of competent jurisdiction in the colony, and a foreclosure and judicial sale directed, and the allegations in the bill of fraud were merely general, and denied, Lord Chancellor Erskine refused an injunction; the Lord Chancellor said that the circumstances of this case precluded him from exercising any jurisdiction (4). Where a British subject, entitled to real and personal estate, both in England and in the Netherlands, died domiciled in England, leaving a will by which he gave to trustees, upon certain trusts, all his property here and abroad; but as to his foreign property, so far only as he could dispose of it according to the law of the country where it was situate; and a decree was made in England for the administration of his estate, and subsequently one of his children instituted proceedings in the Netherlands for the administration of both his real and personal estate in that country; Vice-Chancellor Sir J. Stuart—considering

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If the Courts of Scotland have power to preserve property *pendente lite* this Court will not interfere.

(1) *Cruikshank v. Robarts*, 6 Madd. S. C. sub. nom. *Cartwright v. Pettus*, 104. 2 Ch. C. 214.

(2) *Carteret v. Petty*, 2 Sw. 323, n.; (3) 2 Sw. 313, 321, 326.

(4) *White v. Hall*, 12 Ves. 321.

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that as to the real estate the Court would not interfere, but that inasmuch as the proceedings in the Netherlands related to personally as well as realty, they ought to be restrained altogether—made an order restraining the prosecution of the pending proceedings in the Netherlands, and the taking any other proceedings there as to the personal estate; and on appeal from this order, Lord Justice Knight Bruce held, that the order ought not to have absolutely restrained the appellant from carrying on the pending proceedings in the Netherlands, but ought to have left her at liberty to carry them on as to the real estate if she could do so without proceeding as to the personal estate; but Lord Justice Turner held, that the order ought not to be thus varied, the appellant not having shewn that the proceedings could be carried on as to the landed estate without proceeding as to the personal estate (1).

15. In *Downes v. Jackson* (2) an injunction was granted by the Lords Justices, as the Court of Appeal of the Chancery of the County Palatinate of Lancaster, against a creditor of the testator out of the jurisdiction of the Lancaster Court; the creditor having commenced proceedings in the Queen's Bench against the executors; and an administration decree had been made in the Chancery Court of Lancaster.

16. After a decree or order on summons for the administration of an estate, a legatee will be restrained from prosecuting a common law plaint against an executor in the County Court to recover a legacy, and that, notwithstanding the legatee submits to take a judgment against the executor *de bonis propriis*, alleging a *devastavit* (3).

17. A Court of Equity will not entertain a suit for enforcing a foreign judgment against a defendant unless he has received actual or substituted service of notice of the proceedings in the foreign Court (4); but when, by reason of the neglect or refusal of a trustee to do his duty, a *cestui que trust* is compelled to resort to a foreign Court for enforcing his right against the trustee, though the trustee should not be served with a notice of such proceedings, the

(1) *Hope v. Carnegie*, L. R. 1 Ch. 320; 14 W. R. 260.

(2) 14 W. R. 907.

(3) *Ratcliff v. Winch*, 16 Beav. 576.

(4) *Griffin v. Brady*, 18 W. R. 130.

Court will, on application by the *cestui que trust*, order the trustee to pay the costs of such proceedings, as being costs necessarily incurred in consequence of the refusal of the trustee to do his duty (1).

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18. Before this Court interposes upon an interlocutory application to stay proceedings in a suit, by reason of a decree or judgment in a foreign country, it must be satisfied that the foreign decree or judgment does justice, and covers the whole subject of the suit (2).

This Court will not stay proceedings in a suit unless satisfied that the foreign decree, &c., does justice and covers the whole subject of the suit.

19. Where a debtor became bankrupt in England, having real estate in Scotland, the Court held, that this state of circumstances gave no jurisdiction to the Court of Chancery to restrain a creditor who had not proved under the bankruptcy from proceeding in an action against the assignees in Scotland, for the purpose of recovering out of the real estate there an amount equal to the dividend which would have been payable upon the debt; and the grounds on which the Court of Chancery restrains creditors from proceeding against an execution after a decree for administration do not exist in such a case. Lord Justice Turner said that in the cases in which this Court interferes to restrain creditors from proceeding either in the Courts of this country or in foreign Courts, for the recovery of their debts, this Court does not interfere (as it was called upon to do in this case) before decree, and that its interference after decree was, as he apprehended, founded on this, that the decree is a judgment for all the creditors; and besides, that this Court has, by the decree, the complete control of the estate, and that it would not permit its jurisdiction to be interfered with (3).

20. Service of a notice of motion for an injunction after a decree of this Court for the administration of a testator's estate, on a Scotch company, a creditor, not a party to the suit, at the office in London, is, for the purposes of the corporation, a good service, where it is admitted that at the head office in Scotland the corporation had notice (4).

21. Where, in Ireland, by the custom of an inferior Court, on an affidavit of debt, an attachment issued against the goods of the

(1) *Griffin v. Brady*, 18 W. R. 130.

(3) *Pennell v. Roy*, 3 De G. M. & G.

(2) *Ostell v. Le Page*, 2 De G. M. & 126.

G. 892.

(4) *Maclaren v. Stainton*, 16 Beav. 279.

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defendant below, and unless he could procure bail to pay such debt, damages, expenses, and costs as should be awarded against him, the defendant below could not enter an appearance, or have a trial of the action on the merits; and a party so circumstanced filed a bill for an injunction, stating that he was not indebted to the defendant (who had brought the action in the inferior Court), in equity; the Court held, that it had no power to grant the injunction (1). And, *semble*, the proper course would be a writ of error to the Court of Queen's Bench or Common Pleas; but *quære*, whether such a custom is valid (2).

The existence of, or resort to, the writ of *auditâ querelâ* does not preclude the defendant at Law from filing his bill for relief, where a Common Law Court has set aside the writ in a summary proceeding.

This Court can enforce an agreement between part owners of a ship, with regard to the management of the ship, and possession of certificate of registry.

22. Although the writ of *auditâ querelâ* is said to be "in the nature of a bill in Equity to be relieved against the oppression of the plaintiff" (3), yet the defendant at Law is not, either by the existence of that remedy, or by having unsuccessfully resorted to it, precluded from bringing his original bill in Equity for relief against the plaintiff in a case where the Court of Law has set aside the writ in a summary proceeding; but *quære*, whether the fact that a writ of *auditâ querelâ* had been obtained and was in force would preclude a bill in Equity by the same defendant on the same ground (4).

23. There is no difficulty or question as to the existence of the jurisdiction of this Court to enforce the rights of some against the other part owners of a ship, with regard to the management of the ship, and the possession of the certificate of registry, where those rights are regulated by an agreement entered into between all the owners of the ship, it being the province of this Court to deal with the agreement of the parties (5).

24. Where, in an action for imprisonment under a commitment for contempt, the order was pleaded, and the plaintiff demurred, the Lord Chancellor, on appeal, discharged an order by the then Court of Review in Bankruptcy, granting an injunction limiting the plaintiff as to the particulars in respect of which he might, on such demurrer, question the validity of the order, on the ground that doubts might be entertained whether the form of the proceeding before him admitted of an appeal from his decision to

- (1) *M'Anaspie v. Dickson*, 13 Ir. Eq. Rep. 216.
(2) *Ib.*

- (3) 3 Bl. Com. 406.
(4) *Williams v. Roberts*, 8 Hare, 315.
(5) *Darby v. Buines*, 9 Hare, 369.

the House of Lords, whereas a writ of error would lie from that of the Court of Law (1).

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25. In *Duncan v. M^cCalmont* (2) the Court granted an injunction to restrain proceedings in the Admiralty Court respecting a bottomry bond and freight of a ship, on the ground that the matters could be more conveniently, directly, and effectually determined in this Court. The Court of Admiralty is open all the year round to applications by part owners to restrain the sailing of ships without their consent until security given to the amount of the respective shares; but where the shares are not ascertained, that Court has no jurisdiction; and in such a case the Court of Chancery will exercise a concurrent jurisdiction by injunction to restrain the sailing of the ship until the share of the party complaining shall be ascertained, and security given to the amount of it (3); and in this case it was referred to the Master to make the inquiry and to settle the security accordingly. But upon a bill by a part owner of a ship, in which the shares in the vessel were ascertained, against the master and other part owners, praying an account of the past earnings of the ship, to which the plaintiff was entitled; Vice-Chancellor Sir J. Wigram held, that his right to that relief afforded no reason for going on to restrain the sailing of the ship until security was given for the plaintiff's shares according to the practice of the Admiralty Court (4); and the Vice-Chancellor said he did not wish to give any encouragement to the idea that this Court had jurisdiction between the part owners of a ship when no point was in question but whether one part owner could take the ship away. There is no relief in Equity against a security given for performing the sentence of a Court of Admiralty, although reversed on appeal, and the Court to which the appeal had been made had no jurisdiction; the reversal, the Court having no jurisdiction, was, therefore, not only informal, but utterly null and void; and the consequence thereof was, that the first sentence became the final sentence, for non-performance of which the bond was forfeited, and judgment given at Law for S., who had been adjudged the owner of a ship, the subject of the litigation, and who

(1) *Ex parte Van Sandau, In re Martin*, 1 Ph. 445; 1 De G. 55.

(2) 3 Beav. 409.

(3) *Haly v. Goodson*, 2 Mer. 77.

(4) *Castelli v. Cook*, 7 Hare, 89; *vide Halloran v. Donal*, 9 Ir. Eq. Rep. 219; *et p.* 411, *ante*.

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had got the bond out of Court and sued thereon, to be relieved against which the bill was filed (1).

26. In *Buckingham v. Buckingham* (2) the Court granted a perpetual injunction *nisi* against disputing a will in the Ecclesiastical Court, after a decree confirming it, and that decree confirmed in the Lords. In *Blad v. Bamfield* (3) the Court granted a perpetual injunction to stay proceedings against a Dane for the seizure of property of English subjects in Iceland, the seizure having been sanctioned by decisions of the Danish Law Courts.

The Court refused to interfere to restrain a Court, legally constituted a special jurisdiction.

27. Where a Canal Act provided that in case the company and the coal owner could not agree as to the amount of compensation for the coal taken for the purposes of the canal, it should be settled by a jury summoned by the commissioners, whose verdict was "to be conclusive, and should not be removed by certiorari or other process whatever into any of the Courts of record at Westminster, or any other Court;" and a bill was filed praying an injunction to restrain proceedings before a jury, on the ground that the defendant was entitled to no compensation, and that the special jurisdiction provided by the Act was not so constituted as to be likely to come to a just conclusion; the Master of the Rolls, Lord Langdale, held that the plaintiffs were not entitled to an injunction if the defendant was entitled to any compensation the amount of which had to be ascertained (4). The Master of the Rolls said no equity could be founded on an allegation that a Court legally constituted was not properly competent to decide questions within its jurisdiction; that the Legislature had given the jurisdiction to the Court provided by the Act, and had made its decision final; if any inconvenience arose from the legal exercise of the jurisdiction, the legislature alone could apply a remedy, and that he had not thought it necessary to give any opinion upon the question of jurisdiction, in case it had clearly appeared that the defendant was not entitled to any compensation.

28. After a decree in a suit in Chancery for an account against the defendant who afterwards proceeded against the plaintiff in the Court of Bankruptcy under the 1 & 2 Vict. c. 110, s. 8, by

(1) *Denew v. Stock*, 3 Sw. 662;
Rep. t. Finch, 437; *vide Love v. Baker*
1 Ch. Ca. 67; Nelson, 103.

(2) 2 Eq. C. Ab. 526.

(3) 3 Sw. 604.

(4) *Barnsley Canal Company v. Turbell*, 7 Beav. 19; 13 L. J. (Ch.) 434, affirmed by the Lord Chancellor.

filing an affidavit of debt against him, the Court of Chancery, under the special circumstances of the case, without deciding as to its jurisdiction, refused an injunction to stay the proceedings in the Court of Bankruptcy; Vice-Chancellor Sir J. L. Knight Bruce said if this were a case in which on general grounds the defendant ought to be prevented from issuing a fiat, the Lord Chancellor or the Court of Review was the proper quarter to which to make an application on the subject (1).

29. In *Whitfield v. Ralfe* (2) an injunction was granted by this Court, though the Court of Law in which the action had been brought had, upon an application made to it to stay proceedings on a release of one of the plaintiffs, and affidavits of the circumstances and equities of the case, refused to stay proceedings.

30. This Court would grant an injunction against proceeding in the Ecclesiastical Court where a suit on the same matter had already been commenced in Chancery (3). And would restrain a man from suing for his wife's jointure in the Spiritual Court until he had made a competent provision for her (4). This Court and Courts of Law supervised the acts of the Spiritual Court when they were incidental to their own determinations. If an instrument came before a Court of Equity which appeared not to be an act *inter vivos*, in order to found a decree upon it as a testamentary act, it was necessary to prove it in the Spiritual Court; but if the Spiritual Court proved there, what was an act *inter vivos*, this Court considered the probate as void, and *coram non judice*, as much as if that Court had proved a will relative to lands only (5). In this case Lord Keeper Henley held that an instrument executed in the East Indies during a last illness, empowering certain parties to invest portions of the estate of the donor of the power in bottomry in trust for his wife, although it had been proved in the Ecclesiastical Court as a testamentary schedule or instrument, was merely an act *inter vivos*, and not a revocation of a will executed prior to the date of the instrument. Though in *Basset v. Basset* (6), where a legacy of £800 was bequeathed to E., payable at twenty-one or

Proceedings in Court of Law re- strained (here) though that Court had exercised jurisdiction on the case. Proceedings in Ecclesiastical Court for same matter as in Chancery, re- strained.

(1) *Perry v. Walker*, 1 Y. & Coll.

C. C. 672.

(2) *Coop.* 89.

(3) *Parre v. Tipelady*, Cary, 73.

(4) *Tanfield v. Davenport*, Toth, 114.

(5) *Pigott v. J. Anson*, 1 Eden, 469.

(6) 3 Atk. 203, 207.

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marriage, charged on a mixed fund, and she died unmarried before twenty-one ; Lord Chancellor Hardwicke held that as assets were admitted, Equity would not grant an injunction to stay proceedings in the Ecclesiastical Court for the recovery of the legacy, as the Ecclesiastical Court had a proper jurisdiction for legacies charged on personal estate ; yet in an *Anonymous Case* (1) the same Lord Chancellor held that where there was a trust, or anything in the nature of a trust, notwithstanding the Ecclesiastical Court had an original jurisdiction in legacies, yet the Court of Equity would grant an injunction, trusts being only proper for the cognizance of this Court. And where the husband of an infant instituted a suit in the Ecclesiastical Court for her legacy, upon the executors bringing a bill, and suggesting this matter to the Court, an injunction was continued on the hearing (2). And this Court granted an injunction to stay the husband's proceeding in the Spiritual Court for a legacy given to his wife, the husband not having made any settlement on or provision for the plaintiff his wife (3), and because that Court could not oblige him to make an adequate provision for her (4). And the judgments of the Ecclesiastical Court are as much subject to the equity of the Court of Chancery as the judgments at Law. And in *Vanbrough v. Cock* (5) it was held that this Court would relieve a party who had no remedy by appeal from the Ecclesiastical Court, as the delegates were bound.

31. In *Bullock v. Bullock* (6) the Court of Chancery refused an injunction to restrain a suit in the Exchequer (Equity side) for the same matter, but granted one to restrain the trustees from transferring the fund, as was prayed in the suit in the Exchequer ; and as the suit in Chancery applied to the whole fund, and that in the Exchequer only to a portion, the Lord Chancellor recommended the latter to be dismissed, and the parties to go on in this suit in Chancery. But in *Newburg v. Wren* (7) the Lord Chancellor said the Court of Exchequer was an ancient Court of Equity, yet that the same was but a private Court, and that its jurisdiction properly

(1) 1 Atk. 491 ; *Hill v. Turner*, Id. 515.

(2) *Ib.*

(3) *Meals v. Meals*, Dick. 373 ; S. C. *sub. nom. Meals v. Mealis*, 5 Ves. 517, note (a).

(4) *Nicholas v. Nicholas*, Prec. Ch. 546, 548.

(5) 1 Ch. Ca. 200.

(6) 3 Sw. 698.

(7) 1 Vern. 220.

was only for getting in the King's revenue, and for the King's officers, and that there were several precedents that injunctions had gone to the Court of Exchequer from Chancery.

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32. The Poor Law Amendment Act enacts, that no order of the Poor Law Commissioners shall be removed by *certiorari* into any Court of record, except the King's Bench, and that every order which shall be removed into that Court shall nevertheless, until declared illegal, continue in force, and be obeyed in the same manner as if it had not been so removed; and the Court of Chancery has no jurisdiction to restrain the Poor Law Commissioners, nor the guardians of a union acting under their order, from acting upon such order pending proceedings under a *certiorari* obtained by the plaintiff to try its validity (1). Lord Chancellor Cottenham, upon reversing the judgment of Vice-Chancellor Sir L. Shadwell (who had overruled a demurrer), said he apprehended that the limits within which this Court interferes with the acts of a body of public functionaries, constituted like the Poor Law Commissioners, were perfectly clear and unambiguous; that so long as those functionaries strictly confined themselves within the exercise of those duties which were confided to them by the Law, this Court would not interfere; and that the Court would not interfere to see whether any alteration or regulation which they might direct was good or bad; but if they were departing from that power which the Law had vested in them, if they were assuming to themselves a power over property which the Law did not give them, this Court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority (2).

This Court has no jurisdiction to restrain Poor Law Commissioners, nor the guardians of a union acting under their orders, pending proceedings under a *certiorari*.

So long as public functionaries, such as the Poor Law Commissioners, confine themselves to the exercise of the duties confided to them, this Court will not interfere; but if they depart from that power, the Court treats them as persons dealing with property without legal authority.

33. Where a writ of *scire facias* to repeal letters patent granted to P. had been issued under the fiat of the Attorney General in the usual manner, and P. thereupon applied to the Attorney General for the purpose of obtaining from him a direction that all further proceedings in the action should be stayed, and that a *nolle prosequi* might be entered; and the application to the Attorney General was not successful, and in consequence thereof the patentee obtained, on the Petty-bag side of the Court, an order to the prosecutor to shew cause why all further proceedings should not be stayed, or

(1) *Frewin v. Lewis*, 4 My. & Cr. 249; 9 Sim. 66.

(2) S. C. 4 My. & Cr. 254.

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that a *nolle prosequi* might be entered; upon an application by the patentee to the Court of Chancery to stay all proceedings on the *scire facias* to repeal the patent, or that a *nolle prosequi* might be entered, on the ground, first, that the prosecutor was an alien; secondly, that he had no special interest in the patent or the repeal of it, but was acting in collusion with other persons with a view to oppress the patentee; and thirdly, that the security for costs given by the prosecutor was improper and insufficient; the Master of the Rolls, Lord Langdale, held (and his decision was affirmed by Lord Cottenham) that the Court had no authority to interfere in the matter. The Master of the Rolls said he would hope there was some error or exaggeration in the notion that the writ of *scire facias* to repeal a patent issues, and that the fiat for that purpose is granted by the Attorney General, as of course. But the Courts exercise over the Attorney General the same authority which they exercise over every other suitor, and the Attorney General would not, any more than any other suitor, be permitted to prosecute any proceeding which was merely vexatious, or had no legal object; but the Attorney General conducts the proceedings on a *scire facias*, according to his own judgment and discretion, and may, when he thinks fit, stay the proceedings, or enter a *nolle prosequi*; and the control which is his, is subject only to the responsibilities to which every public servant is liable in the discharge of his duty, and subject to the jurisdiction which the Courts may have over him upon a charge properly brought against him for a negligent or erroneous performance of his duty (1). And the Master of the Rolls said that he was of opinion that in the ordinary course of proceeding upon a writ of *scire facias* to repeal letters patent it is within the discretion of the Attorney General to determine upon what or upon whose information, or on what terms or security, he will permit the action to be prosecuted; and that the exercise of his discretion in the conduct of the action is not subject to the control of the Courts in which the proceeding takes place; but in case of apparent hardship appearing to the judge in the course of proceedings before him, as likely to arise from the enforcement of a legal right, or from failure of security for costs by reason of the death of a relator or otherwise, the Master of the Rolls said he conceived that the judge

(1) *The Queen v. Prosser*, 11 Beav. 306.

may properly suggest to the Attorney General the propriety of his considering the case, and may properly stay the proceedings, to give to the Attorney General sufficient opportunity to do so; but that he was not aware that the judge had any authority to overrule the decision of the Attorney General when formed.

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34. In *Ex parte Lynch* (1) the Court refused a prohibition to enjoin the judge of a Prize Court from proceeding in a question of prize or no prize.

35. A suit in a Court of Equity, properly instituted, will prevent time from running, and a Court of Law ought to act upon this principle, the same rule being prescribed by the statute for both Courts. This Court, however, will protect its own jurisdiction, and will not permit a suitor to be evicted at Law who has an equitable right to sue for the land, and has filed his bill within the limits allowed, and duly pursued his remedy (2).

A suit in a Court of Equity prevents time running, and this Court will not permit a suitor to be evicted at Law who has filed his bill within the limits allowed.

36. Where, upon a bill filed in the Court of Chancery in England, by creditors, a decree was made to execute the trusts of a deed by which lands in Ireland were vested in trustees for the payment of debts, and the debtor, a peer of the realm, did not answer the bill, nor appear at the hearing of the original suit, but filed an answer to a supplemental suit, and by cross bill impeached the debts as fraudulent, and opposed the proceedings by counsel in various stages of the supplemental suits and by the decrees in these suits; an injunction was granted and a receiver appointed; but it being found to be impracticable to execute the decree, a bill was filed in the Court of Chancery in Ireland to carry the former decree into execution; the House of Lords held, reversing the judgment of the Court below, that, under the circumstances, the Court had jurisdiction, that the propriety of the English decree might be examined in the suit in Ireland, and that if part of it was sustainable it might so far be executed by the aid of the Irish Court, although other parts might be erroneous (3). In *Harrison v. Gurney* (4) trustees for creditors, after a decree for the execution of the trusts:

The Court of Equity in Ireland has jurisdiction to examine and carry out a decree made in England.

Suit in Ireland restrained (here), there being a decree

(1) 1 Mad. 15.

(3) *Houlditch v. Donegal*, 8 Bli.

(2) *Wrixon v. Vize*, 3 D. & War. (N. S.) 301; 2 Cl. & F. 470.

104; 2 Con. & L. 138; 1 Con. & L.

(4) 2 Jac. & W. 563.

298; 2 D. & War. 192.

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in England
for the same
objects.

were restrained from proceeding in a suit in the Court of Chancery in Ireland having the same objects.

37. In *Stanhope v. Pilkington* (1) the Court refused to compel a resort to Commissioners appointed under an Act of Parliament to settle disputes between parties arising from making certain rivers navigable; in this case a lease for years of a mill had expired, and the landlord proceeding to recover possession, the Court refused to interfere, on the ground that the legal rights of the parties then arose, and each must be left to deal as it thought proper with those rights.

38. Upon an interpleader suit upon opposite claims, all the defendants but one, residing out of the jurisdiction, in Scotland; the plaintiff, after a reasonable time, having used due diligence to bring them in, which he must shew, upon being decreed to give up the subject to the only defendant appearing, will be protected afterwards against the others by a perpetual injunction to restrain any action they may bring, and an order would be made that service on the attorney of those who had not appeared should be good (2).

Special jurisdiction to award compensation does not exclude jurisdiction of this Court in trusts, &c.

39. Where, under a convention with France for indemnifying British subjects for the confiscation of their property by the French revolutionary government, and the Act of the 59 Geo. 3, c. 31, compensation for an estate and the moveable property on it was awarded by the commissioners to A., as executor and residuary legatee of B.; and a bill was filed by one of the co-heiresses of the wife and children of B., all of whom had died in his lifetime, alleging that, by the then existing laws of France, the will of B. was inoperative, and that a moiety of the property did not belong to him, but to his wife, from whom it had descended to the children, and from them to the plaintiff and another person, co-heiress with her, and claiming for such co-heiress a moiety of the compensation; and no claim had been duly made before the commissioners in respect of the alleged title which the plaintiff sought to enforce, neither had there been any discussion before them as to that title, but the facts out of which it arose were disclosed or alluded to in the proceedings which led to the award;

(1) Coop. 193.

(2) *Stevenson v. Anderson*, 2 V. & B. 407; v. pl. 18, p. 368, *ante*.

Lord Chancellor Eldon, affirming the decision of the Vice-Chancellor so far as dismissing the bill, but not on the same grounds—the dismissal of the Vice-Chancellor being apparently on the ground that there was no case in which the decision of the commissioners could be affected by any suit in this Court, the Lord Chancellor observing that a proposition of that kind was much too large—held, that under the circumstances of this case the Court of Chancery would not interfere to relieve the plaintiff (1). But where a person, in whose favour an adjudication under these conventions had been made by the commissioners, or the Privy Council, was affected by a trust, or by fraud, the Court had jurisdiction to enforce the trust or relieve against the fraud; and these conventions and treaties, and the Act for carrying them into effect, did not exclude the jurisdiction of a Court of Equity to examine and enforce equities attaching upon the compensation in the hands of the person in whose favour the award of the commissioners had been made. The Lord Chancellor said, that he continued to think that this Court had a jurisdiction to attach equities on the award of the Commissioners in some cases; but that he did not think that the claim of the defendants here could be considered as a claim in respect of which they could be deemed to be affected by equities (upon the state of this record) in favour of the plaintiff (2). And so, in *Hill v. Reardon* (3), the Lord Chancellor was of opinion that this Court had in cases of trusts jurisdiction notwithstanding the decision of the commissioners, or of the Privy Council on appeal, but refused an injunction to restrain a transfer of the fund on the ground that the affidavit of the plaintiff's title was not positive.

40. In an *Anonymous Case* (4), the Court held, that, though it would not proceed against a member that had the privilege of Parliament, yet that if a member of Parliament sued at Law, and a bill were brought to be relieved against that action, the Court would make an order to stay proceedings at Law till answer or further order.

41. Where a fund belonging to foreigners out of the jurisdiction was, by arrangement among them, sent by A., one of their number,

(1) *Hill v. Reardon*, 2 Russ. 608; (3) Jac. 84.

2 S. & S. 431.

(4) 1 Vern. 329; vide *Wildbore v. Parker*, Mose. 125.

(2) *Ib.*

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to English agents for distribution among the persons entitled, and A., having endeavoured to get back the fund and misapply it, one of the foreigners filed a bill to restrain the misapplication, and for the administration of the fund; Vice-Chancellor Sir W. P. Wood disallowed a plea to the jurisdiction by the English agents, although the fund was not so invested as to enable the Court to order service on the defendants abroad; the Vice-Chancellor said, it might be practicable before the hearing to see that notice reached those defendants, and that he had no reason then for concluding that they would not appear and submit to, or come within, the jurisdiction, but that if they did not, that the possibility that there might be a failure of justice by their not submitting to the jurisdiction, was to be dealt with as Lord Eldon dealt with a similar case in *Stevenson v. Anderson* (1) (a bill of interpleader, where all the defendants but one were out of the jurisdiction), where Lord Chancellor Eldon said, that "if the plaintiff can shew that he has used all due diligence to bring persons out of the jurisdiction, to contend with those who are within it, and they will not come, the Court upon that default, and their so abstaining from giving him the opportunity of relieving himself, would, if they afterwards came here and brought an action, order service on their attorney to be good service, and injoin that action for ever;" and the Vice-Chancellor said that he apprehended the Court would act on the same principles where one of the parties entitled or claiming files his bill against a stakeholder in this country (2).

Equity can entertain a bill respecting land, though it is not within its jurisdiction.

42. "Equity may entertain a bill respecting land, though the land is not within its jurisdiction, where its decree can be enforced by acting on the person of a party; and, in a proper case, the Court will restrain the party from leaving the jurisdiction by a *ne exeat* (3).

43. "The authority of this Court, as a Court of Chancery, upon a proper case being made, to restrain persons within its jurisdiction from prosecuting suits either in the Courts of this State and of other States (U.S.), or foreign countries, is clear and indisputable. In the exercise of this power, Courts of Equity proceed not upon any claim of right to interfere with or control the course of pro-

(1) 2 V. & B. 407; *vide ante*, pl. 86.

(3) *Enos v. Hunter*, 4 Gilm. 211

(2) *Central Railroad and Banking* (Amr.)

Company v. Mitchell, 2 H. & M. 452.

ceedings in other tribunals, but the jurisdiction is founded on the clear authority vested in Courts of Equity over persons within the limits of their jurisdiction and amenable to process, to restrain them from doing acts which will work wrong and injury to others. As the decree of the Court in such cases is pointed solely at the party, and does not extend to the tribunal where the suit or proceeding is pending, it is wholly immaterial that the party is prosecuting his action in the Courts of a foreign state or country" (1). In this case a citizen of Massachusetts attached in Pennsylvania personal property of an insolvent debtor residing in Massachusetts. The Court held that the assignees of such debtor, under the insolvent laws of Massachusetts, might maintain a bill for an injunction, though the suit was commenced before the institution of insolvency proceedings, more especially if done with notice that they were about to be instituted, and in order to obtain a preference (2).

44. In Vermont (U.S.) it was held, that a suit in one state will be enjoined to parties in another only when the ends of justice, and not the mere convenience of parties, require it (3).

(1) *Per* Bigelow, C.J., *Dehon v. Foster*, 4 Allen, 545 ;
Foster, 4 Allen, 550 (Amr.) 7 Ib. 57 (Amr.)

(3) *Bank, &c. v. Rutland*, 2 Wins. 470 (Amr.)

CHAPTER IX.

INJUNCTIONS GENERALLY.

PART I.

Where an injunction is applied for on a distinct ground, which fails, it will not in general be granted on another ground, which has not, but might have been, put forward.

Though the legal right be doubtful, the Court will, in its discretion, according to the exigencies and circumstances of each case, grant an injunction.

1. Where a plaintiff alleges and proves in a case for an injunction a peculiar and specific injury, the order which he obtains gives him an extended right in general terms to restrain any injury of the same kind; but where the peculiar and specific injury is distinctly stated upon the pleadings, and where the words used describe another peculiar and specific injury proposed to be proved, the plaintiff is not entitled to relief (1). Where a bill states that an injury by the defendant will, by a certain mode of operation, be inflicted upon the plaintiff, and then, after giving notice of motion for an injunction, that mode of operation is changed and another adopted, the whole-some arrangement is to amend the bill; and general words in a motion for an injunction are only justified by establishing a specific case of injury (2). Where an injunction is applied for upon a distinct ground which fails, it will not in general be granted upon another ground which has not been put forward, but which it appears might have been put forward in the circumstances of the case (3).

2. In *Ollendorf v. Black* (4), Vice-Chancellor Sir J. L. Knight Bruce said, that it had been said in this case, that the legal right was doubtful, and that the mere existence of the doubt was sufficient to prevent the Court from granting the injunction; that in that he did not agree; he believed that such a doctrine was new in this Court, and would interfere theoretically and practically with its jurisdiction, daily exercised, to a very great extent. That the circumstance of the legal right being in doubt was a matter for serious attention, but did not render it incumbent on the Court to refuse an injunction; that the Court must be guided by a discretion according to the exigencies and the nature of each particular

(1) *Hertz v. Union Bank of London*,
1 Jur. (N. S.) 127.

(2) 1b.

(3) *Castelli v. Cook*, 7 Hare, 89.

(4) 4 De G. & Sm. 209, 210.

controversy. In *Dalglish v. Jarvie* (1) the Lord Commissioner, Lord Langdale, said that when a Plaintiff came for an injunction to restrain the Defendant from the prosecution of his legal right, there were several things to be considered; not only was the amount of the injury which might be done to be taken into account, but also the extent to which the decision at Law upon the subject could go, and the degree of certainty, more or less, in reference to that decision; and that, taking these several matters into consideration, the Court would in some cases refuse to interfere at all, and in others refuse to interfere otherwise than by postponing the question for a time, and giving the opportunity of bringing an action in the meanwhile; but that in certain other cases, where justice could not be done without it between the parties, the Court, notwithstanding the inconvenience, would grant the injunction in the first instance, and would not leave the party to any other course of proceeding to ascertain the legal right; that which of these courses was the proper one to be followed must depend on all the circumstances of each particular case. The object of the interference of a Court of Equity by interlocutory injunction between two parties who are at issue upon a legal right, is solely the protection of the property in dispute until the legal right shall have been ascertained, and therefore such an injunction ought always to be accompanied by a provision for putting the question into a course of speedy investigation at Law (2). In *Sanxter v. Foster* (3), Lord Chancellor Cottenham said that the Court ought not to interfere (*i.e.*, upon an interlocutory application) for the purpose of preventing a party from enforcing a legal claim without securing to itself the means of putting him in the same position, in the event of his turning out to be right, as if the Court had not interfered. A probability of right is sufficient to sustain an injunction (4). In *Great Western Railway Company v. Birmingham and Oxford Junction Railway Company* (5), Lord Chancellor Cottenham said the Court would in many cases interfere to preserve property *in statu quo* during the pendency of a suit in which the rights to it were to be decided, and that, without express

The object of an interlocutory injunction is to protect the property until the legal right shall have been ascertained.

A probability of right is sufficient to sustain an injunction. The Court often preserves property *in statu quo*, without

(1) 2 Mac. & G. 231, 242; 2 H. & Tw. 437.

(2) *Harman v. Jones*, Cr. & P. 299.

(3) Cr. & P. 302.

(4) *Tonson v. Walker*, 3 Sw. 679.

(5) 2 Ph. 597.

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forming any
opinion on the
rights to it.

If the bill
states a sub-
stantial ques-
tion, the title
to the injunc-
tion may be
good,
although the
title to relief
may fail.

It is not neces-
sary to shew
an indefeasi-
ble right to
the decree
prayed, in
order to con-
tinue an
injunction.

ing, and often without having the means of forming, any opinion as to such rights; that it was true the Court would not interfere if it thought that there was no real question between the parties, but that seeing there was a substantial question to be decided, it would preserve the property until such question could be regularly disposed of; and that in order to support an injunction for such purpose it was not necessary for the Court to decide upon the merits in favour of the Plaintiff; and that if the bill states a substantial question between the parties, the title to the injunction may be good, although the title to the relief prayed might ultimately fail. But the circumstances of the case, at the time when the motion is made, must be such as to enable the Court to interfere between the parties, or to put the question between the parties into a course of trial, and where that is not the case the motion will not be allowed to stand over till the purpose has been so far executed as that its character may be judged of, but will be at once refused (1). It is not necessary for a party who seeks to continue an injunction to the hearing, to shew an indefeasible right to the decree prayed by the bill; where, therefore, assignees of a bankrupt sought a specific performance of an agreement for a lease against a party who was herself a lessee, and restrained from assigning without the consent of the lessor in writing thereto obtained, the Court continued the injunction to restrain proceedings at law, there being a probability of obtaining the consent of the lessor to the assignment (2). Doubts in matters of law are always sufficient ground for continuing an injunction once granted (3); but upon an application in *Spottiswoode v. Clarke* (4) to discharge an order made by the Vice-Chancellor of England restraining the defendant from selling almanacs with the title 'Pictorial Almanac' printed thereon, so as, by colourable representation, to represent the almanac published and sold by the defendant to be the same as the almanac printed and sold by the plaintiff for the year 1847; Lord Chancellor Cottenham said that all these cases depended upon their own circumstances, and that all that the Court could do was to lay down the principles upon

(1) *Haines v. Taylor*, 2 Ph. 209; (2) *Powell v. Lloyd*, 2 Y. & J. 427.
10 Beav. 75.

(3) *Maxwell v. Ward*, 11 Price, 3.

(4) 2 Ph. 154; 1 Coop. C. C. 254.

which it acts, in order that parties might know what measure of relief they had to expect in any particular case; and that he had often expressed his opinion, that unless a case of this kind, depending upon a legal right, was very clear, it was the duty of the Court to take care that the right be ascertained before it exercised its jurisdiction by injunction; and that the first question to be determined was as to the legal right; and that if the Court doubted about that, it might commit great injustice by interfering until that question had been decided; and that it was much better, if the legal right was to be litigated, that this Court should abstain from expressing any opinion upon it in the meantime; but that the greatest of all objections was, that the Court ran the risk of doing the greatest injustice in case its opinion on the legal right turned out to be erroneous; and that in this case, if the plaintiff was right, the Court had some means, at least, of indemnifying him, by making the defendant keep an account; whereas if the defendant were right, and he were restrained, it was utterly impossible to give him compensation for the loss he would have sustained; and that the effect of the order in that event would be to commit a great and irremediable injury; and that unless, therefore, the Court was quite clear as to what were the legal rights of the parties, it was much the safest course to abstain from exercising its jurisdiction till the legal right had been determined; and that he was not, however, so satisfied that this was a case in which the plaintiff had a legal right against the defendant as to justify him in restraining the latter from the sale of his work until that right had been established in the proper tribunal and that, therefore, the injunction must be dissolved, the defendant keeping an account, and the plaintiff to be at liberty to bring an action.

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Unless a case depending on a legal right is very clear, the Court will not interfere until the right is ascertained.

3. At the hearing of a cause a much greater degree of acquiescence must be shewn to deprive parties of their rights than would be a sufficient defence to an interlocutory application; a degree amounting, in fact, not only to positive license, but to an implication of an actual grant (1). There is a distinction between the effect of acquiescence, upon a motion for an injunction and on a

A much greater degree of acquiescence must be shewn at the hearing to deprive parties of rights than would be sufficient to disentitle to an interlocutory injunction.

(1) *Patchin v. Dubbins*, 1 Kay, 1.

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Upon interlocutory motion, acquiescence disentitles to injunction, upon demurrer it must be such as to disentitle to any relief.

demurrer; in the former case acquiescence merely prevents the special protection by injunction, but in the latter it must be such as to disentitle the plaintiff to any relief whatever (1).

A party may move to dissolve an injunction, if from its ambiguity he may be prejudicially affected.

4. A party is entitled to move to dissolve an injunction, if, from ambiguity in its terms, he may, under any construction of the order, be prejudicially affected (2). And it is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction, and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward; thus, where a plaintiff obtained an *ex parte* injunction on the facts stated in the bill, but other facts came out in the defendant's answer, raising a question of law on which the right of the plaintiff to the injunction depended; the Court held, that the omission of the plaintiff to bring the facts under the notice of the Court was of itself a sufficient ground for dissolving the injunction (3). So in *Dease v. Plunkett* (4), an injunction order, in a possessory suit in Ireland, was set aside upon the ground that the plaintiff had not fully and fairly stated his case in the first instance. If a plaintiff mistakes his case (as here, by representing £300 a year was separate property of his wife, and £80 a year alimony; but the wife in her answer said the whole £380 a year was for alimony, and that that constituted the whole of her income), an injunction obtained by such misstatement will be dissolved (5). When a plaintiff comes for an *ex parte* injunction he must state his case in the first instance fully and fairly (6). And in *Attorney-General v. Liverpool (Mayor, &c.)* (7), the Master of the Rolls said it is an established rule that where a party comes for an *ex parte* injunction, and misrepresents the facts of the case, he shall not then be permitted to support the injunction by shewing another state of circumstances in which he would be entitled to it; because the jurisdiction of the

Injunction will be dissolved if the case is not fully and fairly stated.

If an *ex parte* injunction is obtained by misrepresentation of facts, it will not be sustained by shewing other facts.

(1) *Gordon v. Cheltenham Railw. Co.*, 5 Beav. 229.

(2) *Dalglish v. Jarvie*, 2 Mac. & G. 231; 2 H. & T. 437.

(3) *Ib.*

(4) Dr. 255.

(5) *Vanderghucht v. De Blaquiere*, 8 Sim. 315, 323.

(6) *Hemphill v. M'Kenna*, 2 D. & War. 183; 2 Con. & L. 76.

(7) 1 My. & Cr. 171, 210.

court in granting *ex parte* injunctions was obviously a very hazardous one, and one which, though often used to preserve property, might be often used to the injury of others, and it was right that a strict hand should be held over those who come with such applications.

5. Although the Court has power to restrain parties from using a building which has been erected in a form that is in violation of the terms of a contract, or of an Act of Parliament, yet a small excess in the height of a building beyond that to which it might lawfully have been raised, where no irreparable injury arises from such excess in height, would not be a case in which the Court would interfere by interlocutory injunction to restrain the use of the building after it had been erected (1).

The Court will not restrain, upon interlocutory motion, a small excess in height of a building in violation of a contract or an Act, where no irreparable injury.

6. Where, upon motion for an injunction in a matter involving the making of profit, the granting the injunction is suspended, it is the usual practice to direct the defendant to keep an account of profits in the meantime (2).

If the granting an injunction is suspended, it is usual to direct an account of profits to be kept.

7. The jurisdiction of the Court to restrain by injunction an act which the defendant is by contract bound to abstain from, is not confined to cases in which there are either no other executory terms in the contract, or none which a Court of Equity has not the means of enforcing. If a bill states a right or title in the plaintiff to the benefit of a negative agreement on the part of the defendant, or of his abstaining from a given act, the Court will equally interfere by injunction, whether the right be at Law or under an agreement which cannot be otherwise brought under its jurisdiction (3).

8. In *Rundell v. Murray* (4) Lord Chancellor Eldon said that a Court of Equity frequently refused an injunction where it acknowledged a right when the conduct of the complaining party had led to the state of things which occasioned the application; laying down that not only conduct with the party with whom the contest exists, but conduct with others, may influence the Court in the exercise of its equitable jurisdiction by injunction.

Conduct with others than the defendant, may influence the Court in the question of granting an injunction.

(1) *Warden, &c., of Dover Harbour v. South Eastern Railw. Co.*, 9 Hare, 493.

(2) *Swallow v. Wallingford*, 12 Jur. 403.

(3) *Dietrichsen v. Cabburn*, 2 Ph. 52; 1 Coop. C. C. 72.

(4) Jac. 311; *vide Saunders v. Smith*, 3 My. & Cr. 711, 730.

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9. The Court has power to restrain a party from allowing a thing to continue, which has the effect of making him take some active measures, and this is a species of negative injunction (1).

10. In *Drewry v. Thacker* (2) Lord Chancellor Eldon said, that if the order for an injunction, on payment of costs of the action, was in the usual form of injunctions after a decree for administration, it was improper, as the parties entitled to the injunction, if they were required to pay costs as a preliminary, might, from the situation of the estate, be unable to obtain it in time.

11. In *Goodale v. Goodale* (3) the Court granted an injunction before answer to restrain the defendants from parting with documents in their possession belonging to the plaintiff, and from preventing the plaintiff and her solicitor from having access to the documents at all reasonable times, and after reasonable notice.

12. The Court will grant an injunction to restrain one of the defendants to a bill from parting with the property in question in the cause (the property being in this country), notwithstanding the principal party interested (another of the defendants) is out of the jurisdiction (4).

13. The Court will not grant an injunction to restrain parties from proceeding to deal with property whose right, if it exists, depends upon the construction of a doubtful statute, where the granting of the injunction would for ever deprive them of an opportunity of exercising the right, especially if no danger exists from allowing them so to proceed (5).

An injunction
against a co-
defendant will
be granted
under special
circumstances.

14. In *Edgecumbe v. Carpenter* (6) an injunction was granted, under the special circumstances of the case, on the application of one defendant, to restrain a co-defendant from proceeding with an action. And in *Kingham v. Maisey* (7) an injunction was granted, on the motion of the plaintiff, to restrain an action brought by one defendant against a co-defendant.

15. Where a plaintiff states upon his bill a case entitling him to be relieved against a bond, and the defendant protects himself

(1) *Spencer v. London and Birmingham Railw. Co.*, 8 Sim. 193, 198; *vide Rankin v. Huskisson*, 4 Sim. 13; *et p.* 217, *ante*.

(2) 3 Sw. 541.

(3) 16 Sim. 316.

(4) *Malcolm v. Scott*, 3 Hare, 39.

(5) *Att.-Gen. v. Liverpool (Mayor of)*, 1 My. & Cr. 171.

(6) 1 Beav. 171.

(7) 2 Sim. 41.

from answering several of the circumstances which are essential to the plaintiff's equity on the ground that the discovery of them would expose him to pains and censures in the Ecclesiastical Court, but admits other circumstances connected with these; if the Court, comparing what is admitted with what is refused to be answered, sees reason to think that the case is one which is fit for inquiry in Equity, an injunction will be granted (1).

16. In *Walton v. Johnson* (2) the Court made an order in a summary way, on motion, to restrain a person not a party to the suit, to whom the receiver had left a farm as tenant from year to year under an agreement to cultivate in a husbandlike manner part of the estates in the cause, from moving hay, straw, &c., therefrom, he having had notice to quit, and as being contrary to the custom of the country; Vice-Chancellor Sir L. Shadwell said, the tenant having entered into an agreement with the Court itself by means of the receiver, he did not think it necessary that a bill should be filed against him. And so in *Attorney-General v. Ancaster (Duke of)* (3) an injunction was granted to a tenant in possession, not a party, from committing waste. And in *Casamajor v. Strode* (4) the Court granted an injunction, on motion, to restrain a purchaser under a decree, not a party to the cause, who had not paid his purchase-money, from committing waste on the property purchased.

17. In *Blakemore v. Glamorganshire Canal Navigation* (5) Lord Chancellor Brougham said that the leading principle which, as he humbly conceived, ought, generally speaking, to be the guide of the Court, and to limit its discretion in granting injunctions (*i.e.*, interlocutory injunctions), at least where no very special circumstances occur, was, that only such a restraint should be imposed as might suffice to stop the mischief complained of; and where it was to stay further injury, to keep things as they were for the present.

18. In *Hill v. Turner* (6) Lord Chancellor Hardwicke said that an injunction, when awarded, did not deny, but admitted, the jurisdiction of the Court of Common Law, and that the ground on

Injunction granted (here) against persons not parties to the suits.

Only such restraint should be imposed as sufficient to stop the mischief, where no special circumstances.

Injunctions admit the jurisdiction of the Common Law Courts,

(1) — *v. Donovan*, 2 L. J. (Ch.) 56.

(3) Dick. 68.

(2) 15 Sim. 352.

(4) 1 S. & S. 321

(5) 1 My. & K. 154, 185.

(6) 1 Atk. 515, 516.

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and so of the Ecclesiastical Courts, but are issued on the ground that this jurisdiction is being made use of contrary to equity and conscience.

which it issued, was that they were making use of their jurisdiction contrary to equity and conscience; and that it was the same with regard to the Ecclesiastical Court, in case of a legacy left in trust, where the trustee was suing for payment into his own hands, the Court would restrain him, out of regard to the interest of the *cestui que trust*, and would do it likewise in the case of a portion devised to a daughter upon marriage, where the husband was suing for it before he had made an adequate settlement.

19. Though a Court of Equity could not, on petition for a *prohibition*, prohibit the Ecclesiastical Court, yet it would restrain by injunction a woman who had married a ward of Court from proceeding, on an excommunication obtained in the spiritual Court, either against the infant or his guardian (1).

20. Upon a bill by the owner of an estate in Demerara against an incumbrancer thereon, to restrain him from enforcing payment in this country of notes which had been given for part of the debt, on the ground that the incumbrancer could not deliver up the "*grosse*" copy of the acts of hypothecation (2), which, it was alleged, was necessary to a valid discharge, the common injunction (according to the then practice) was obtained. The answer admitted that the incumbrancer had no *grosse* copy in his possession, and that a second *grosse* copy would not be issued by the Court without indemnity; but it did not state for what purpose, or in whose favour, the indemnity was required, or that *grosse* copies had not been actually taken out in respect of the charges which the defendant had upon the estate, or that any inquiries or searches had been made in reference to these questions, or that any cancellation or discharge had been entered in Court in respect of the previous payments on account of the debt. The plaintiffs and the defendant had both acted with regard to the estate, in their previous dealings concerning it, without requiring the production of the *grosses*. The Court dissolved the injunction upon the incumbrancer giving security to indemnify the plaintiffs from any

(1) *Hill v. Turner*, 1 Atk. 517.

(2) The "*grosse*" copy is the office copy of the record of the transaction in the Court, and is considered as the authentic document evidencing the title

of the mortgagee; mortgages, according to the Dutch law, being effected, not by private deed between the parties, but by act of Court.

consequences arising from the absence of the *grosses*, on the ground that there was not on the answer an equity confessed by the defendant, entitling the plaintiffs, in this stage of the cause, to have the proceedings in the action stayed until the hearing, and either the *grosses* produced or the plaintiffs protected against that injury which they said they should or might be exposed to if they paid the money without having the *grosses* produced and satisfaction entered on them (1).

21. The Courts of this country will apply the general law of this country—being founded on abstract principles of justice, and not upon any peculiarities of system—to questions between a mortgagor and mortgagee of lands in a colony, unless it is suggested that there is a peculiarity in that respect, in the law of the colony (the Dutch law in this case); and therefore the mortgagee of an estate in Demerara was held, by Vice-Chancellor Sir J. Wigram, not to be bound to produce his securities for inspection before payment (2).

22. When the Court has interfered in aid of a legal right by granting an injunction upon the terms of the plaintiff's bringing an action, it will deprive the plaintiff of the injunction if he does not proceed to trial; but there must be promptness on the part of the defendant in making any application to the Court, and no acquiescence in the injunction by delay in so doing, here, for sixteen months after the injunction had been obtained (3).

23. Where the plaintiff at Law had obtained a verdict pending a common injunction, which stayed execution only, and not the trial, and the cause afterwards came on in Equity, the Court held, that this Court would deal with the judgment according to the equitable grounds appearing at the hearing; but that the equity alleged by the plaintiff being equally available for his defence to the action at Law, the Court would not interfere with the judgment, and dismissed the bill with costs, and dissolved the injunction (4).

This Court deals with a judgment at Law according to the equities, but if they are available at Law in the action, the Court will not interfere.

24. The Court exercises a wide discretion as to keeping up or dissolving injunctions; and where the plaintiff, who had obtained an injunction, became an insolvent, and delay occurred in appointing

On insolvency of plaintiff, if suit retarded, injunction will be dis-

(1) *Bentinck v. Willinck*, 2 Hare, 1.

(3) *Bickford v. Skewes*, 4 My. & Cr.

(2) *Ib.*

498; 10 Sim. 193.

(4) *Butts v. Mathews*, 5 L. J. (N. S.) (Ch.) 134.

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solved, unless a supplemental bill be promptly filed.

an assignee, and the suit was thereby retarded, on an application by the defendant the injunction was ordered to stand dissolved unless a supplemental bill was filed in a week; and a supplemental bill having been filed and answered, the plaintiff, on a second application by the defendant, was ordered to set down the cause forthwith, or the injunction stand dissolved; the Lord Chancellor disregarding the objection that, by the course of the Court, the plaintiff in the supplemental suit was entitled to time to bring the cause regularly to hearing (1).

The Court will, under special circumstances, grant an injunction at the hearing, though not prayed for by the bill. So, in certain cases, after decree.

25. Under special circumstances the Court will, at the hearing of the cause, grant an injunction, though not prayed for by the bill (2); and in a foreclosure suit, if, after a decree, the mortgagor, being in possession, commits waste, an injunction will be granted, although not prayed for by the bill (3); and so in other suits an injunction will be granted, after a decree, to restrain proceedings contrary to the decree (4).

It is the duty of the Court to see that no injury arises from its interference by staying proceedings to establish a right at Law.

26. In *O'Donel v. Browne* (5) Lord Chancellor Manners said that he took the principle to be as laid down by Lord Eldon in *Pulteney v. Warren* (6), that where a party is prevented by the Court from proceeding to establish his right at Law, it was the duty of the Court to see that no injury arose to him in consequence of its interference; therefore, where an annuitant was restrained by injunction from proceeding at law to recover the arrears of rentcharge, arrears of interest accrued subsequent to the issuing the injunction were decreed by way of compensation for the injury (7).

Sale sometimes stayed after decree for sale pending an appeal, but if of personal chattels, ample security must be given for their value.

27. Pending an appeal the Court will sometimes stay the sale of property which the decree has directed to be sold; but if the property consists of personal chattels remaining in the possession of the appellant, he must give ample security for their value (8).

(1) *Caird v. Campbell*, 1 Moll. 484.
(2) *Blomfield v. Eyre*, 8 Beav. 250;
v. p. 680, *ante*, pl. 8; *Reynell v. Sprye*,
1 De G. M. & G. 660.

(3) *Goodman v. Kine*, 8 Beav. 379;
et vide Wright v. Atkyns, 1 V. & B. 313.

(4) *Vide Paxton v. Douglas*, 8 Ves.
520; *Casamajor v. Strode*, 1 S. & S.
381; *Wedderburn v. Wedderburn*, 2

Beav. 209; *Flight v. Chambre*, 14
Jur. 123; *Grand Junction Canal v.*
Dimes, 17 Sim. 38; *Turner v. Turner*,
19 L. J. (Ch.) 352.

(5) 1 Ball. & B. 262.

(6) 6 Ves. 73.

(7) *O'Donel v. Browne*, 1 Ball. &
B. 262.

(8) *Nerot v. Burnand*, 2 Russ. 56.

28. In *Lord Southampton v. Birmingham Railway Company* (1) the Court refused an injunction where no irreparable injury was shewn, and the title of the plaintiff was not sufficiently set out in the bill, and no act of ownership proved to support an allegation of possession and enjoyment.

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No injunction where title insufficiently shewn in bill, and no act of ownership proved.

29. In a case in Ireland where the plaintiff had outlawed his debtor, and had obtained an injunction, and was proceeding to obtain a custodian, but, fearing lest the property should be carried off, he had filed a bill for an injunction; the Court held, that he was entitled to an injunction to preserve the property until he could obtain his custodian (2).

Plaintiff entitled to an injunction to preserve property until custodian could be obtained.

30. The Lord Keeper, in *Hayward v. Angell* (3), said, that in all cases where the matter lay in compensation, be the condition precedent or subsequent, he thought there ought to be relief; and in *Wallis v. Crimes* (4) it was held that the Court would relieve against the breach of a condition precedent, where it was in the nature of a penalty.

31. The jurisdiction of Equity is never exercised to decree compensation singly, without other relief (5); and compensation for non-performance of an agreement is not a mode of equitable relief (6); but this Court granted relief against forfeiture by breach of covenant by a lessee, where compensation could be made (7). In this case Lord Chancellor Erskine said, that in the then late case of *Sanders v. Pope* (8) he was very unwilling to give the relief against breach of other covenants, but was compelled by a series of authorities—*Cage v. Russel* (9); *Northcote v. Duke* (10); *Hack v. Leonard* (11); *Wafer v. Mocatto* (12); *Eaton v. Lyon* (13)—establishing that, where covenants are broken, and there is no fraud, and the party is capable of giving complete compensation, it is the province of a Court of Equity to interfere and give relief against the forfeiture for breach of other covenants, as well as that for

The jurisdiction of Equity is never exercised to decree compensation singly, without other relief.

(1) 2 Jur. 1012.

(2) *Barry v. Donnellan*, 1 Hog. 339.

(3) 1 Vern. 222.

(4) 1 Ch. Ca. 98.

(5) *Newham v. May*, 13 Price, 749;

McCl. 511.

(6) *Clinan v. Cooke*, 1 Sch. & Lef.

25.

(7) *Davis v. West*, 12 Ves. 475.

(8) 12 Ves. 282.

(9) 2 Vent. 352.

(10) Amb. 511.

(11) 9 Mod. 90.

(12) 9 Mod. 112.

(13) 3 Ves. 690.

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payment of rent; and that the only distinction was, that in the latter case it was considered so clear that the object of the clause for re-entry was only to secure the payment of the rent, that the Legislature interposed and made it unnecessary to come into Equity, allowing the tenant, upon the terms and within the time specified by the Act (1), to stop the ejectment, leaving the ancient jurisdiction of Equity in every other case untouched. In *Sanders v. Pope* (2) Lord Chancellor Erskine held, that the Court would grant relief against forfeiture, where compensation could be made against a clause of re-entry for breach of a covenant to lay out a specific sum in repairs in a given time, and that the relief was not limited to cases of accident, ignorance, &c., but even against negligence and voluntary acts; and so in *Northcote v. Duke* (3), it was held, that in all cases of condition broken and penalty forfeited, Equity would relieve if there could be compensation; and in *Peachey v. Duke of Somerset* (4) it was held, that a Court of Equity would not assist a copyholder against a forfeiture which is found such at Law, unless in cases where a compensation could be made. However, the above doctrine has been overruled (5), and relief will not now be given against forfeiture for breach of covenant upon the ground that compensation can be made, except when the breach has been the omission of a simple money payment, such as rent (6), unless under very special circumstances (7).

32. The Court has an equitable jurisdiction to grant an injunction, or to order the delivery up of an instrument, though it might be, at the time of the motion, the subject of an action then going on (8); and this although there may be a good defence at Law (9);

(1) 4 Geo. 2, c. 28.

(2) 12 Ves. 282.

(3) Amb. 513; 2 Eden, 314.

(4) Prec. Ch. 568.

(5) *Vide Hill v. Barclay*, 18 Ves. 56; *Reynolds v. Pitt*, 19 Ves. 134, 140; *Bracebridge v. Buckley*, 2 Price, 200; *Gregory v. Wilson*, 9 Hare, 689; *Meek v. Carter*, 4 Jur. (N.S.) 992; *Hillier v. Parkinson*, 9 L. J. (Ch.) 156; *Job v. Banis'e*, 26 L. J. (Ch.) 125; 3 Jur. (N.S.) 93.

(6) *Nesbitt v. Tredennick*, 1 B. & B. 29, 47; *Keating v. Sparrow*, Ib. 367; *Job v. Banister*, 2 K. & J. 382; *Bowser v. Colby*, 1 Hare, 134; *Elliott v. Turner*, 13 Sim. 485.

(7) *Whinthrop v. Murray*, 8 Hare, 214; *Shearman v. Macgregor*, 11 Hare, 106.

(8) *Jervis v. White*, 7 Ves. 413.

(9) *Hodgson v. Murray*, 2 Sim. 515; 3 Sim. 283; *Stackhouse v. Countess of Jersey*, 1 J. & H. 721, 731.

and in *Bromley v. Holland* (1) it was held, that the ancient jurisdiction of the Court had not been destroyed by the assumed jurisdiction of a Court of Law, by an alteration of the law of pleading, dispensing with *profert*, or permitting the averment of a consideration not in the body of the deed.

33. Money paid into Court upon an injunction and laid out, is a security, and not a payment, and therefore if it turns out that less is due to the defendant than the amount paid in, the balance will be restored to the plaintiff (2).

Money paid into Court upon an injunction is a security and not a payment.

34. Though a Court of Equity interposes to prevent multiplicity of suits where there is one common right against several persons, or several have a common right against one, yet a bill by a lord of a manor to establish his mere legal title and for a perpetual injunction cannot be sustained where there is no such ground, namely, to prevent vexatious litigation, and nothing to prevent his trying the title at Law; and a bill of this sort cannot be maintained where a right is disputed between two persons only, and the decree cannot conclude any one except them (3). And where a bill of this sort is brought by one person only against one person only, to establish a title, and for a perpetual injunction, it is the established practice to dismiss the bill, though the defendant has answered and insisted on matter of title (4). But where a large number of persons have similar legal claims against one, he can, by a bill filed against some of them, restrain the proceedings of all until the question as to the validity of the claims has been decided (5); and if the parties are so numerous that it is impracticable or extremely difficult to bring them all before the Court, a bill may be filed against some of the parties, provided so many persons are made parties to secure a fair contest, and that their interests shall be such as to lead to a fair and honest support of the common interest; and when a decree has been obtained with respect to the individual whose interest is fully and fairly established, the Court, on the footing of the former decree, will in another suit carry the benefit

(1) 7 Ves. 3, 19; *Toulmin v. Price*, 5 Ves. 239.

Clark, 3 P. N. 156; *Welby v. Duke of Rutland*, 2 Bro. P. C. 39.

(2) *Broughton v. Pitchford*, 6 Madd. 295.

(4) *Welby v. Duke of Rutland*, 2 Bro. P. C. 39.

(3) *Tenham (Lord) v. Herbert*, 2 Atk. 483; Mitf. Pl. 169; *Cowper v.*

(5) *Sheffield Waterworks v. Yeomans*, L. R. 2 Ch. 8.

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If a bill is dismissed and the decree inrolled, the Court has exhausted its jurisdiction, and will not grant an injunction to preserve property pending an appeal to the Lords.

of it into execution, and grant consequential relief against other individuals who were not parties to the first suit (1).

35. Where a bill has been dismissed, and the decree has been inrolled, the Court has exhausted its jurisdiction in that suit, and will not grant an injunction to preserve the property which was in question in the cause pending an appeal to the House of Lords; and where the plaintiff is desirous of having the property thus temporarily protected, it is incumbent on him to see that the decree is framed so as to keep alive the jurisdiction pending the appeal (2).

36. In *Durell v. Pritchard* (3), Lord Justice Turner said that the authorities upon the subject led, he thought, to the conclusion that the Court would not interfere by way of mandatory injunction except in cases in which extreme or, at all events, very serious damage, would ensue from its interference being withheld. But that the Court had no general rule against granting such relief where the damage had been completed before filing of the bill; and that every case must depend upon its own circumstances, and that there was no difference in this respect between injury to easements and to other rights.

37. Where a case for granting an injunction has been established in an action, the Court will not stay its hand in granting the injunction because the decision of Law is under appeal, unless the Court itself has some doubt of the propriety of the decision at Law (4).

38. Where a defendant at Law pleads an equitable plea, a Court of Equity will not interfere by injunction to restrain the action on grounds identical with those averred in the plea, if the Court of Law can give the same relief as a Court of Equity; but Equity will in such a case interfere if a Court of Law cannot give such relief as a Court of Equity, or if the case cannot be determined there on the merits, or if the circumstances are such that a

(1) *Weale v. West Middlesex Waterworks Company*, 1 Jac. & W. 358; *Adair v. New River Company*, 11 Ves. 429; *Allen v. Donnelly*, 5 Ir. Ch. Rep. 236; see *Foxwell v. Webster*, 10 Jur. (N.S.) 137.

(2) *Galloway v. London (Mayor,*

&c.) 3 De G. J. & S. 59; 11 Jur. (N.S.) 537.

(3) L. R. 1 Ch. 244, 250.

(4) *Att.-Gen. v. Bradford Canal Navigation Company*, 35 L. J. (Ch.) 619; 14 W. R. 579.

Court of Equity would grant an injunction such as the Court of Law could not award (1).

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39. Where after an injunction had been granted restraining a defendant from permitting a certain injurious effect to be produced by a given cause (but not otherwise restraining any definite act), and the apprehended injury took place; but the defendants denied, to the best of their belief, that it arose from the alleged cause; the Court, in such circumstances, refused to treat the defendants as contumacious, until it should have been conclusively determined by a verdict at Law that the injury complained of was produced by the cause assigned (2).

40. Where the owner of a ferry obtained an Act enabling him to substitute a bridge, and providing that persons evading the tolls by conveying passengers, &c., across the river within the limits of the ferry, otherwise than by the bridge, should be liable to penalties, to be summarily enforced by a justice, under a distress warrant, and in default of distress by commitment of the offenders with an appeal to the quarter sessions, but no order, &c., was to be removed by certiorari, or any suit or process, to any Court of record at Westminster; and a railway company afterwards, having their terminus within the limits of the ferry, established steam boats for the conveyance of their passengers across; on a motion to restrain the company from so doing, Vice-Chancellor Sir J. Wigram held, that although the Act which substituted the bridge for the ferry gave no remedy by an action, yet if he, the owner, were entitled to recover penalties against offenders *de die in diem*, the Court would protect him by injunction from the infringement of his right, and as no action could be brought under the Act, the Court would not simply leave the plaintiff to his remedy by distress, in order to try his legal right in replevin, but would direct an issue to try such right, and not allow the defendant to raise an objection at Law on the ground that the alleged wrong was done by a corporation. But the damage here being small in amount, the Court would not prejudice the legal question by granting the injunction, but would require an account to be kept pending the trial; for where the

(1) *Waterlow v. Bacon*, L. R. 2 Eq. 424; 4 Railw. Cas. 81, affirmed 30th July, 1847.
514; 12 Jur. (N. S.) 614.

(2) *Dawson v. Paver*, 5 Hare, 415,

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opinion of the Court is not clearly for or against the plaintiff, and there is no danger of irreparable or very serious mischief, it will be governed by the balance of inconvenience in granting or refusing an injunction (1).

41. Where the corporation of Dublin had immemorially been seised of a watercourse, from which the inhabitant householders of Dublin had been supplied with water, on certain payments made by them under contract or usage; and by local Acts powers were given to the corporation to levy the rates upon the inhabitants, and raise money on the credit of the rates, for the purpose of improving the supply of water; the House of Lords held, that such rates could not be applied, under a resolution or by-law of the corporation, to discharge debts incurred before the passing of the Acts, nor in compensation of the services of the mayor or treasurer of the corporation, or for salaries of new officers, nor in increase of salaries of old officers; and that the costs of a former appeal, in which the corporation were respondents, might be given by the Court below out of the fund of the rates, though not directed by the order made on the appeal (2).

42. Where there is no original equity affecting the claim of a party to compensation under the 68th section of the Lands Clauses Consolidation Act, in respect of lands injuriously affected, the statute does not create such an equity; but where there is an original equity affecting the claim, the statute does not take it away. Where, therefore, an agreement for such compensation has been completed and carried out, and the satisfaction perfected, there is no ground for the interference of the Court, arising out of the provision of the statute; but where the defendant has received the consideration for perfecting the satisfaction, and refuses to perfect it, and a case for specific performance arises, there is nothing in the statute to exclude the interposition of the Court. And the Court does not interfere by injunction to restrain parties who insist that their property has been injuriously affected within the meaning of the 68th section of the Land Clauses Consolidation Act from prosecuting their claim under the Act, upon the mere

(1) *Cory v. Yarmouth and Norwich Railw. Co.*, 3 Hare, 593.

Gen., 9 Bli. (N. S.) 395; 3 Cl. & F. 289; *Att.-Gen. v. Corporation of Dub-*

(2) *Corporation of Dublin v. Att.-*

lin, 2 Hag. 257.

ground that the Act has not provided the means of determining the preliminary question, whether the property has been injuriously affected or not (1). But the Vice-Chancellor, Sir G. J. Turner, said, whether the same rule would apply to a case in which there are several grounds of claim, some of which have been satisfied, remained to be determined; and he said, that being of opinion that the plaintiff had in this case sufficient grounds for contending that some at least of the claims of the defendant were affected by a contract entered into before the claims were advanced, he thought the injunction must be granted (2). In this case the defendant F. claimed against the Duke of N. damages for injury done to his brewery by the erection under the powers of a local and personal Act, which incorporated the Lands Clauses Consolidation Act, of a new market at S. The damages claimed, were, first, for narrowing a street bounding the brewery; secondly, for temporary obstruction of the thoroughfare, and, thirdly, for obstruction of the access of light and air, and contracted ventilation. This last damage did not appear to have been pressed, or discovered, until the new market buildings had arisen to a considerable height, and the defendant gave one notice, embracing all the three heads, to proceed by arbitration, according to sects. 25 and 68, and there had been a treaty for compensation for the two former heads, but it did not appear to have been completed or carried out, and there had been no treaty for compensation as to the third; the Court held, that the nature of the compensation treated for being quite clear, the defendant could be restrained by injunction from proceeding under the notice he had given (3).

43. The business of a dust contractor is not a manufacture, and a tot-shop (*i.e.* a place where the dust and rubbish are sorted and prepared for other purposes) does not form part of, nor is it incident to, a manufactory within the meaning of sect. 92 of the 8 Vict. c. 18. Therefore where a board of works, for the purpose of constructing a new street, had given notice to the plaintiff, a dust

(1) Following *East and West India Docks, &c., Railw. Co. v. Gattke*, 3 M. & G. 155, which overruled *London and North Western Railw. Co. v. Smith*,

1 Mac. & G. 216.

(2) *Norfolk (Duke of) v. Tennant*, 9 Hare, 745; 16 Jur. 398.

(3) *Ib.*

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This Court
will restrain
an action
where the
rights of the
parties thereto
are being de-
termined in
Chancery.

contractor, to take the tot-shop only, Lord Chancellor Westbury held (reversing a decision of Vice-Chancellor Sir W. P. Wood), that the plaintiff was not entitled to restrain the board from taking that part without taking the whole of the premises (1).

44. Where a suit is instituted on the authority of a case, and the doctrine upon which the same was founded has been since got rid of, the plaintiff is entitled to have his bill dismissed without costs (2).

45. The Court of Chancery will restrain by injunction the proceeding in an action, in cases where the rights of the parties thereto, in reference to the subject-matter of the action, are being determined in a suit in Chancery. And where L. & G. were in June, 1870, owners of a ship sailing from Bombay to Liverpool, having on board (among other things) 162 bales of cotton, shipped by H. & Co., of Bombay, and the master of the ship signed bills of lading for the cotton in favour of H. & Co. or order, and the bills of lading were afterwards indorsed by H. & Co. to the Comptoir d'Escompte de Paris; and in September, 1870, C. & P., merchants at Bombay, filed their bill in Chancery against L. & G. and other persons interested, claiming to be entitled to the cotton, and obtained an injunction restraining the defendants from parting with the cotton; and in November, 1870, the bill was amended by alleging that the bills of lading had been hypothecated with the Comptoir d'Escompte de Paris, and by adding the Comptoir d'Escompte de Paris as defendants; and about the same time the Comptoir d'Escompte de Paris commenced an action for damages against L. & G. for the non-delivery of the cotton, and L. & G. filed their bill to restrain the Comptoir d'Escompte de Paris from proceeding in the action; upon a motion by L. & G. in the terms of the prayer of the bill, Vice-Chancellor Sir J. Bacon held, that as the rights of all parties were being determined in the Court of Chancery, the injunction ought to go (3).

46. Where an injunction would inflict great injury on the defendant, and a delay in granting it would cause little or no loss to the

(1) *Reddin v. Metropolitan Board of Works*, 4 De G. F. & J. 532; 31 L. J. (Ch.) 660; 10 W. R. 764; 7 L. T. (N. S.) 6.

(2) *Sutton Harbour Improvement*

Company v. Hitchins, 1 De G. M. & G. 161.

(3) *Laing v. Zeden*, 19 W. R. 273; 40 L. J. (Ch.) 155.

plaintiff, the Court will not grant it on an interlocutory application ; but will direct the motion to stand over till the hearing (1).

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47. Where A., a minor, accepted a bill for £600, drawn by W., who discounted it with D., and received all the proceeds, and A. subsequently applied to D. for an advance, which D. agreed to give upon the terms that the £600 bill should be taken up, and that the new bill should be accepted by B., a brother of A., and twenty-six years old ; and B. accordingly accepted a bill for £1500, of which £574 only was advanced to A., and the remainder being made up of £700 for the old bill and interest, and £226 for discount and commission ; and other similar transactions took place, the old bills being taken up and new bills given ; and B. finally gave D. a charge for £3800 on his reversionary interest in a sum of £30,000 ; Lord Chancellor Hatherley held (affirming a decision of Vice-Chancellor Sir J. Stuart), that as B. was not informed, upon accepting the £1500 bill, that the bill for £600 was invalid, the subsequent transactions based upon it could not stand, and the charge must stand good only for the money actually advanced to A. and B., with interest at 5 per cent ; and that the repeal of the Usury Laws has not prevented relief being given in cases of unconscionable bargains, nor does the 31 Vict. c. 4, as to dealings with reversionary interests, affect its jurisdiction in such cases (2) ; and that an exorbitant rate of interest agreed to be paid by a young and needy man on the security of property in reversion, held by an indefeasible title, is unfair dealing within the 31 Vict. c. 4.

The jurisdiction of the Court over unconscionable bargains is not affected by the repeal of the usury laws, nor by the 31 Vict. c. 4, s. 1, as to reversionary interests.

48. Where, by an Act, commissioners were incorporated, and a district was defined ; and the commissioners were empowered to cause to be paved, drained, and otherwise improved, the town and township comprised in the district, and to be the surveyors of highways within the same, and keep the same in repair ; to “do all acts, matters, and things, for promoting the health, comfort, and convenience of the inhabitants” of the district, which they might deem or consider necessary, and for that purpose to exercise all the powers vested in them by the Act and the Acts incorporated

The Court will restrain commissioners for paving, &c., from applying moneys produced by rates, towards promoting a bill to extend their district.

(1) *Wells v. Attenborough*, 19 W. R. 465.

23 L. T. (N.S.) 447 ; *Chapple v. Mahon*, Ir. R. 5 Eq. 225 ; *et vide Miller v. Cook*,

(2) *Tyler v. Yates*, L. R. 6 Ch. 665 ; 19 W. R. 118, 909 ; L. R. 11 Eq. 265 ;

L. R. 10 Eq. 641 ; 18 W. R. 1061 ; 22 L. T. (N. S.) 740.

PART I.
CHAPTER IX.

Injunction granted against guardians of poor to restrain them, their agents, &c., trespassing on land.

Chancery in England cannot restrain Irish creditor from recovering against estate of deceased intestate domiciled and leaving property in Ireland.

therewith, amongst which were the Companies Clauses Act and parts of the Towns Improvement Clauses Act, 1847, the Court granted an injunction to restrain the commissioners from applying any moneys produced by rates towards the promotion of a bill in Parliament, the object of which was to obtain an extension of their district (1).

49. Where guardians of the poor, wrongfully claiming a right of way to their relieving-office over the plaintiff's land, invited paupers to come that way for relief, the trespass by the paupers causing serious injury to the plaintiffs, an injunction was granted to restrain the guardians, their servants, workmen, and agents, from trespassing (2). In considering the injury, the possible as well as the actual use of the injured premises will be regarded (3).

50. The Court of Chancery in England has no power to restrain an Irish creditor from proceeding to recover his claim against the estate of an intestate deceased debtor, domiciled and leaving property in Ireland; an Irish creditor cannot be compelled to prove his claim in England, and to forego his rights to recover in Ireland, he being in no privity with the English suit (4).

51. In *Turner v. Ringwood Highway Board* (5), Vice-Chancellor Sir W. M. James said that this Court had no jurisdiction to restrain a trespass which did not amount to waste.

52. The Court has no jurisdiction to restrain a plaintiff from taking proceedings to enforce a judgment in his favour, on the ground that the action was brought under circumstances amounting to the common law offence of maintenance (6), nor will the Court interfere with the taxation of costs in an action on the ground that a party is charging for costs which he has never incurred. Such a matter is within the exclusive jurisdiction of the Courts of Common Law (7).

53. Where bills of exchange, of which the plaintiffs in London claimed to be the owners, had been sent to New York to A., who had undertaken as agent to collect the moneys due upon them, and

(1) *Att.-Gen. v. West Hartlepool Improvement Commissioners*, L. R. 10 Eq. 152; 22 L. T. (N. S.) 510; 39 L. J. (Ch.) 624; 18 W. R. 685.

(2) *Ardley v. St. Pancras (Guardians)*, 39 L. J. (Ch.) 871.

(3) *Ib.*

(4) *Browne v. Roberts*, 19 W. R. 115. 18 W. R. 424.

(5) *Elborough v. Ayres*, 18 W. R. 913; 39 L. J. (Ch.) 601; 23 L. T. (N. S.) 68.

(7) *Ib.*

had there got into the possession of B., who took proceedings upon them in an American Court, and had come into the possession of C. in England by virtue of a commission issuing out of such Court, for the purpose of taking evidence in such proceedings; and the plaintiffs, alleging that the bills of exchange came into the possession of B., and subsequently into that of B. and C., by a breach of duty on the part of A. towards the plaintiffs, prayed that the defendants might be ordered to bring into Court, or to deposit the bills, as the Court might direct, and for an injunction to restrain the defendants from negotiating the bills; Vice-Chancellor Sir J. Stuart held, that there was no precedent for any such jurisdiction as he was asked to exercise, and that it would be interfering with the action of the American Court, and a violation of the principles of the administration of justice, and that the complaint, if any, should be asserted in the American Court (1).

54. Where a railway company contracted by letter to purchase lands on certain conditions, one of which being unperformed the vendor brought ejectment, and the company filed a bill, and moved to restrain that action, the company refusing to undertake to abide by any order the Court might make if judgment was given, the injunction was refused (2).

55. The Court will, in a case where the legal right is alone in question, coupled with facts which amount to a qualified consent and acquiescence, award damages instead of granting an injunction to restrain the proceeding by a railway company with works which have done and might do further damage to a neighbouring landowner (3). Where, therefore, a railway company had trespassed on the plaintiff's land by removing his boundary wall, and was proceeding to build another wall, partly on his and partly on their own land, Vice-Chancellor Sir G. M. Giffard directed an inquiry in chambers to assess the amount of damage done, having previously refused an application for an injunction to restrain the rebuilding of the wall (4).

(1) *London and Mediterranean Railw. Co. v. Churchill*, 18 L. T. Bank (*Limited*) v. *Strutton*, 18 W. R. (N. S.) 17.
107; 21 L. T. (N. S.) 415.

(3) *Lockwood v. London and North*

(2) *Salisbury and Dorset Junction Western Railw. Co.*, 19 L. T. (N. S.) 68.

(4) *Ib.*

PART I.
CHAPTER IX.

An Act which interferes with private rights and interests ought to receive a strict construction.

56. In *Hughes v. Chester and Holyhead Railway Company* (1), Lord Justice Turner said that an Act of Parliament which interferes with private rights and private interests ought, according to all the decisions upon the subject, to receive a strict construction so far as those rights and interests are concerned.

57. In *Emperor of Austria v. Day and Kossuth* (2), Lord Chancellor Campbell said that he conceived that this Court had jurisdiction by injunction to protect property from that which, if completed, would give a right of action, and that he by no means said that in every such case an injunction might be demanded as of right, but that if the party applying was free from blame, and promptly applied for relief, and shewed that by the threatened wrong his property would be so injured that an action for damages would be no adequate redress, the injunction would be granted; and that, although an action arising purely *ex delicto* for an injury to property might not have been brought by a foreign sovereign against an English subject in an English Court, on principle he could not doubt that such an action would be maintainable.

58. Where a husband procured his marriage with a minor to be solemnized by a licence, contrary to the provisions of the Marriage Act of 1823, 4 Geo. 4, c. 76, by falsely swearing to certain matters to which he was required by the Act personally to swear, he willfully and knowingly so swearing, and thereby incurred a forfeiture of all such estate, right, title, and interest as should then have accrued, or should thereafter have accrued to him by force of the marriage; and immediately before the marriage the wife was entitled absolutely to a sum of stock outstanding in trustees, and she was also entitled to certain reversionary interests in stock expectant on the death of her mother; the fund in possession being small, Vice-Chancellor Sir J. Bacon, upon an information praying (*inter alia*) an injunction to restrain the trustees from dealing with the funds, instead of ordering a settlement, after declaring the forfeiture, directed the trustees to transfer the residue of the fund into Court, and declared the trusts thereof (3).

(1) 8 Jur. (N. S.) 221; 31 L. J. (Ch.) 97. (2) 3 De G. F. & J. 217; 7 Jur. (N. S.) 639; 30 L. J. (Ch.) 690.

(3) *Att.-Gen. v. Clements*, L. R. 12 Eq. 32.

PART II.

OF INJUNCTIONS TO STAY PROCEEDINGS IN COURTS OF LAW
AND OTHER COURTS.

INTRODUCTION.



Wherever a party by fraud, accident, or otherwise, has an advantage in proceeding in a Court of ordinary jurisdiction, which must necessarily make that Court an instrument of injustice, and it is therefore against conscience that he should use the advantage; in such cases, to prevent a manifest wrong, Courts of Equity interpose by restraining the party whose conscience is thus bound from using the advantage he has improperly gained: and upon these principles, bills to restrain proceedings in Courts of ordinary jurisdiction are of frequent occurrence (1). An injunction, where its object is to restrain proceedings in another Court, is directed only to the parties; it neither assumes any superiority over the Court in which they are proceeding, nor does it deny its jurisdiction, but is granted on the sole ground, that from certain equitable circumstances, of which the Court that issues it has cognizance, it is against conscience for the party to proceed in the cause (2).

(1) Mitf. Pl. 150, 5th Ed.

(2) Eden, Inj. 4.

CHAPTER I.

JURISDICTION.

PART II.

The Court of Chancery can restrain proceedings in a foreign Court—if the Court would restrain proceedings in this country, it would in a foreign Court.

1. The Court of Chancery has jurisdiction to stay the proceedings of parties in a foreign Court (1). If the circumstances of a case are such as would make it the duty of a Court of Equity in this country to restrain a party from instituting proceedings in another Court here, they will also warrant it in imposing on him a similar restraint with regard to proceedings in a foreign Court (2).

2. The fact of a foreigner having property in this country enables a Court of Equity here to make effectual an injunction issued to him. But in the case of a foreigner who seeks no assistance from the Court here, the issuing of such injunction ought clearly to be shewn to be required as conducive to justice (3).

When there is a plain equity in favour of an injunction, and the representatives of the real and personal property who seek it are in this country, the Court will grant it.

3. When there is a plain equity in favour of an injunction, and the representatives of the real and personal property, who seek it, are in this country, the Court will grant it, and restrain proceedings in the Court of a foreign country; and in such a case the Court will decide, upon a consideration of all the circumstances, and require parties here to take or direct such steps in a foreign Court as the ends of justice require; but the particular provisions of the foreign law applicable to a transaction, proceedings as to which in a foreign Court are thus restrained, must not be disregarded (4).

4. A company was chartered in Scotland for the manufacture of iron. Its manufactory and chief office of management were there; it had agents for the sale of the goods in different parts of Scotland and England, and it possessed real estate in both

(1) *Lord Portarlington v. Soulby*,
3 My. & K. 104.

(3) *Ib.*

(2) *Curron Iron Company v. Mac-laren*, 5 H. L. C. 416.

(4) *Ib.*

countries. A., a large shareholder in the company, and possessed of real and personal property in England and Scotland, was the company's agent for the sale of goods in London, and was domiciled here. When he died, he made a will in the English form, and appointed as his executors persons who were resident in both countries; his heir was one of these persons, and was also the person who succeeded him in the London agency of the company. Probate of the will was taken out in England, and such of the executors as thought fit to apply to the Scottish Court were, according to the Scotch law, confirmed in the execution of the will. An administration suit was instituted in the Court of Chancery in England by the executors and trustees of A., and the usual order for a general account of the debts and assets made. After the date of this order, the company took proceedings in the Scotch Courts against the real and personal estate of the testator in Scotland. Notice of an injunction, at the suit of the executors, was served on the company's agent in London, and on the company's manager in Scotland; the company did not appear, and the injunction was issued. The company then moved to dissolve the injunction. No order was made; but it was held by the House of Lords (Lord St. Leonards *dissentiente*), that the injunction could not be maintained; and upon a second bill being filed in this country by the executors and trustees of A. against the Scotch company for discovery of the dealings and transactions between the company and the testator, there being conflicting evidence as to whether it would be more convenient to take the accounts in this country or in Scotland, a motion in both suits to restrain the Scotch company from proceeding in their suit in Scotland, was refused with costs (1). But the Court has the power, and under the circumstances, in *Bushby v. Munday* (2), an injunction was granted, to stay proceedings in the Court of Session in Scotland. In *Kennedy v. Cassillis* (3), an injunction granted to restrain proceedings in the Court of Session in Scotland was also dissolved under the circumstances.

This Court has power to stay proceedings in Scotland.

5. In a question on the effect of a contract in the circumstances

(1) *Maclaren v. Stainton, Maclaren*
or *Stainton v. Carron Company*, 2 Jur.
(N. S.) 49; *vide* S. C. 1011, *ante*.

(2) 5 Madd. 297.

(3) 2 Sw. 313; *v. S. C. ante*, p. 1015.

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of the case, where the Court had concurrent jurisdiction with a Court of Law, and had assumed such jurisdiction by interfering to protect the rights of the parties, the Court restrained the parties to the contract from bringing actions at Law founded on the facts with regard to which the Court had interfered, and in which actions the same question of the legal effect of the agreement, and in the circumstances, would necessarily arise (1). This was a suit to carry into effect an agreement by giving the plaintiff relief in respect of a breach of the agreement by the defendants, and, at the same time, on the ground of such breach, to remove them from an office of trust and confidence which they held by virtue of the agreement, and to appoint other persons to such office; and the Court, considering the plaintiffs entitled to the relief sought, restrained the defendants, by interlocutory order, from prosecuting actions at Law against the plaintiffs under the agreement to recover damages for removing the defendants from such office; and in this case the Court, on an interlocutory application, appointed a ship's husband, at the suit of some of the part owners of a ship, as against the others, who were, under a contract, ship's husband as well as part owners (2).

6. Although the Court of Chancery has jurisdiction to grant an injunction, at the suit of the assignees of a bankrupt, to restrain the obligee under a heritable bond, executed by the bankrupt before his bankruptcy, from proceeding in the Court of Session in Scotland to obtain payment of his debt out of a real estate in Scotland belonging to the bankrupt at the date of the bond, and thereby charged with the debt; it will not exercise that jurisdiction if the circumstances of the case render its interference unadvisable; as, if the question between the parties might, upon the whole, be more conveniently litigated, and with a more conclusive result, there than here (3).

7. Equity will interpose by injunction, although the Court of Law might, from the form of action, advert to the equities of the parties (4).

Equity will interpose by injunction, although the Court of Law could advert to the equities.

(1) *Brenan v. Preston*, 10 Hare, 331.

(2) *Ib.*; *vide* S. C. p. 410, *ante*.

(3) *Jones v. Geddes*, 1 Ph. 724; 14 Sim. 606; *v. S. C.* p. 1013, *ante*.

(4) *Meux v. Smith*, 1 M. D. & De G. 396; 2 M. D. & De G. 315, 789; 11 Sim. 410; *v. S. C.* *ante*, p. 562.

8. It is not of itself a sufficient ground to obtain an injunction in this Court to restrain proceedings on a matter in the King's Bench in England, that an injunction has been granted on an interlocutory application in the Court of Chancery in Ireland, to restrain proceedings at Law there; but a final judgment may be obtained in this Court, if an interlocutory injunction has been granted in Ireland.

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It is not sufficient to restrain proceedings (here) that an

9. Where a reference has been made under the 9 & 10 Will. 3, c. 15, that is, of matters out of Court, and the submission has been made a rule of a Court of Law, there is no jurisdiction in Equity by injunction to stay process of the Court of Law upon the award (2).

There is no jurisdiction in Equity to stay process of a Court of Law upon an award of matters out of Court, made a rule of Court under 9 & 10 Will. 3, c. 15.

10. If an administrator, having entered into the usual bond in the Prerogative Court to exhibit an inventory within a limited time, &c., allowed time to elapse without exhibiting an inventory, and a creditor put the bond in suit in the name of the archbishop, the Court would grant the administrator an injunction on the terms of his giving judgment in the action, which was to stand as a security for the costs at Law and in Equity (but not for the debt), and amending the bill by submitting to account (3).

11. The general rule is, that where a person has two funds to resort to, and another person has some rights in common with him on one of the funds, but no right on the other, the latter has a right to restrain the former from proceeding against that fund which is alone liable to his debt until the other be exhausted (4). But where, under Forfeiting Acts, the loyalists' estates in America were to be sold for the payment of debts, it was nevertheless held, that this was no ground for an injunction to restrain an action in England on a bond (5). In this case the plaintiff was a British subject, resident in America, who, during the American war, adhered to the British government. After the declaration of independence of the United States, his property in those States was confiscated, subject to the claims of his creditors. Previously to the breaking out of the war he was indebted, by bond, to the testator of the defendant, who died before the Act of Confiscation

The general rule is, that a person having two funds, can be restrained by another having but one of them, from proceeding against that one, until the other is exhausted.

(1) *Ball v. Storie*, 1 S. & S. 210.

dale (Lord) v. Littledale, 2 Ves. J. 451.

(2) *Nichols v. Roe*, 3 My. & K. 431; 5 Sim. 156, *vide* S. C. p. 622, *ante*; *Gwinnett v. Bannister*, 14 Ves. 530; *Nichols v. Chalie*, 14 Ves. 267; *Harding v. Wickham*, 2 J. & H. 676; *Lons-*

(3) *Thomas v. Archbishop of Canterbury*, 1 Cox, 399.

(4) *Lanoy v. Duke of Athol*, 2 Atk. 446; *Aldrich v. Cooper*, 8 Ves. 388.

(5) *Kempe v. Antill*, 2 Bro. C. C. 11.

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passed, leaving the defendant his executor. The defendant, instead of resorting to the special fund set apart by the American government for the payment of his debt, came to this country, and then brought his action upon the bond; whereupon the plaintiff filed his bill for an injunction. The Act of Confiscation did not, in terms, make any distinction between creditors well or ill-affected to America; but it appeared by the answer that the defendant, having taken part against the Americans, had become as obnoxious as the plaintiff, and was obliged to quit that country, where he believed that his estates had been since confiscated, and himself declared guilty of high treason. Although, therefore, there appeared no strictly *legal* objection to his resorting to the fund specially made liable by the American government, it seems clear that the same events which made the plaintiff's property liable, made it practically impossible for the defendant to resort to it as a fund for payment. In *Peters v. Erving* (1), Lord Chancellor Thurlow dissolved an injunction against proceeding at Law on a bond, expressly on the ground of the defendants not knowing of the debtor's property in America until the filing of the bill, but expressed an opinion, that if the creditor could *bonâ fide* obtain anything in America he ought to do so. In a subsequent case (2), the same Judge repeated and applied the doctrine thus pointed at. In this case it appeared that one of the defendants, who claimed under a bond creditor of the plaintiff, having applied to the commissioners appointed by the American government to determine claims upon confiscated property, such commissioners had refused to adjudicate, and had referred him to the American legislature; but he had not applied to that legislature, believing that such application would be wholly useless. The greater part of these facts appearing by the answer of one of the defendants, who was the attorney of the principal defendant, the Lord Chancellor granted an injunction; the Master of the Rolls, Sir L. Kenyon, who assisted him, concurring; and at the hearing of the cause the Lord Chancellor said he was still of the same opinion as he was before, as to the equity in general; his Lordship said: "If a creditor here had a fund in a public treasury provided for

(1) 3 Bro. C. C. 54.

(2) *Wright v. Nutt*, 3 Bro. C. C. 326; 1 H. Bl. 137.

payment of his debt, and would notwithstanding pursue the debtor personally, it would be the most unconscientious case possible." The principle of *Wright v. Nutt*, although supported by the authority of Lord Loughborough, in a case at Law where the same sort of question arose (1), has been disapproved by Lord Eldon in a later case, which related to the same estate as the case of *Wright v. Nutt*, and in which the circumstances were nearly the same (2). In that case his Lordship, referring to those authorities, said: "This is a question of great importance, and if I found myself bound to decide this cause not upon the facts, but upon the principle laid down in the authorities to which I am referred, admitting the facts formed a ground for the application of that principle, I should have been obliged to express a different opinion from all those authorities, much as I respect them. I should certainly have thought it my duty to consider the case very much before I should have permitted myself to express that contradiction of authority;" and further on, he said: "Is it the law, that under such circumstances the personal liability of the debtor is taken away? That is not contended. It must be founded upon the law of nations, I presume. Is it the law, that under such circumstances the remedies resulting out of that liability shall be restrained by confining the remedies to particular funds, or by confining them altogether as to the person, till the creditor has had recourse, not to all the funds of the debtor, but to some of his funds, which funds in the original constitution of the debt, and the transaction forming the relation of debtor and creditor, the debtor did not propose, nor the creditor receive, as the funds to be charged by the contract with that debt;" and he said, "I am of opinion that if the principles laid down in that judgment were clearly right, the facts of this case do not bring it within the reach of those principles. They all concur that the creditor must have the clear means, and it must be shewn that he has the clear means, of making his demand effectual." And that it was not clear that the creditor had such clear means, that he was one of the well-affected (to the government of America); that he could have had recourse to the fund (3).

(1) *Folliott v. Ogden*, 1 H. Bl. 123. 727, 731, 736.

(2) *Wright v. Simpson*, 6 Ves. 714, (3) *v. Drewry*, Inj. 57; Kerr, Inj. 69.

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12. Whilst suits were depending in the Court of Chancery, the plaintiffs indicted the defendant's agent at the sessions, where they themselves were judges, for a breach of the peace, an order was made to restrain the plaintiffs from proceeding at the sessions till the hearing of the cause and further order; at the same time the Court held that there was no restraining power over criminal prosecutions in this Court, but the Attorney-General will, of course, grant a *nolle prosequi* to a criminal prosecution where an action of trespass will lie; and *pendente lite* in the Court of Chancery this Court will stop an action of trespass *vi et armis*; and where a bill is brought to grant possession, if, after that, the plaintiff prefers an indictment for forcible entry, this Court will stop the proceedings upon such indictment (1).

13. In *Codd v. Woden* (2) it was held that the practice of the Court of Law compelling a plaintiff on a bond not to take execution beyond his just debts, did not oust the jurisdiction of this Court in awarding an injunction, and a demurrer to a bill on that ground was overruled.

14. The fact that a plaintiff's title is equitable, and not legal, entitles him to the aid of the Court of Equity in the trial of his rights; and this Court will, in such a case, restrain by injunction proceedings in the Mayor's Court (3). Where a separate commission of bankruptcy overreached an attachment in the Lord Mayor's Court, by relation to the act of bankruptcy, an injunction was granted against proceeding under a foreign attachment by a joint creditor (4).

15. Where, after a decree to account, the defendant in Equity took steps to make the plaintiff a bankrupt under the 1 & 2 Vict. c. 110, upon which the plaintiff applied for an injunction, the Court refused to grant it, not denying the jurisdiction, but saying that the Lord Chancellor, or at that period the Court of Review, was the proper Court to restrain the issuing of a fiat for an improper purpose; and the Court also relied on the refusal of the plaintiff to admit himself a trader (5).

(1) *Mayor, &c., of York v. Pilkington*, 2 Atk. 302; 9 Mod. 273.

(2) 3 Bro. C. C. 73.

(3) *Cotesworth v. Stephens*, 4 Hare, 185; *vide* p. 418, *ante*.

(4) *Barker v. Goodair*, 11 Ves. 78.

(5) *Perry v. Walker*, 1 Y. & C. Ch. 672.

16. The Court, having no doubt of its jurisdiction, granted an injunction to stay proceedings on a bottomry bond in the Admiralty Court, where the transaction required investigation, and the subject matter was within the jurisdiction of the Court, and equities to be settled before complete justice could be done, which could only be satisfactorily secured in the Court of Equity (1).

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The Court has jurisdiction to restrain proceedings in the Admiralty Court, on a bottomry bond.

17. Where new evidence has been discovered at a period when, according to the practice of the Admiralty Court, it could not be received, this Court will grant an injunction to stay proceedings upon a sentence in that Court (2).

So, where new evidence has been discovered not receivable by the Admiralty Court.

18. The Court of Chancery will interfere by injunction to restrain a plaintiff from prosecuting two distinct suits in different Courts for the same object, either in this or a foreign country; but a plaintiff may carry on proceedings in one Court to establish a demand, and in another Court to obtain security, which the former Court is unable to give him, for what should be found due to him (3). In this case the plaintiffs had obtained a decree for an account in the Court of Chancery in England against the defendants, some of whom resided in Scotland, and had estates there. The plaintiff then instituted proceedings in the Court of Session in Scotland for the same purposes as the English suit, and also to obtain a lien on the Scotch estates of the defendants. The Court of Chancery granted an injunction, on the application of the defendants, to restrain the plaintiffs from proceeding with the suits in the Court of Session, except for the purpose of procuring security for what might be found due to them. In *Baillie v. Baillie* (4), where an amalgamated company, constituted of an English insurance company and another company having offices in London and Edinburgh, had brought an action in England, in which they had obtained judgment, and had instituted proceedings in Scotland against the executors in respect of a debt due to them by H., one of the legatees (who were also executors, under a will in the English form) of a domiciled Englishman, having died, having real and personal property in England and Scotland; upon

This Court will restrain a plaintiff from prosecuting two distinct suits in different Courts for the same object, either in this or a foreign country. But a plaintiff may carry on proceedings in one Court to establish a demand, and in another Court to obtain security which the former Court is unable to give him, for what should be found due to him.

(1) *Duncan v. M'Calmont*, 3 Beav. 208; 4 My. & Cr. 585.
409. (4) L. R. 5 Eq. 175; 17 L. T. (N.S.)
(2) *Jarvis v. Chandler, T. & R.* 319. 376; 37 L. J. (Ch.) 225; 16 W. R.
(3) *Wedderburn v. Wedderburn*, 2 272.

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a bill by D. (another legatee and executor), who had lent H. sums on memoranda of charge on his interest in the testator's estate, for an account of the testator's estate, and what was due to him on the memoranda of charge, and to restrain the proceedings at Law by the insurance company, Vice-Chancellor Sir R. Malins held, that the testator being a domiciled Englishman, and the executors not admitting assets, *non constat* that there would be any residue upon which the actions could attach, and therefore, upon the executors undertaking to obtain an administration decree, made an order for an injunction to restrain any proceedings in Scotland involving the taking the accounts of the testator's estate, without prejudice to the establishment of their right against H.'s share to a charge, and without prejudice to any question of priority as between the company and the plaintiff in Equity.

This Court will restrain a suit in Ireland for the same subject-matter as a suit in England in which the plaintiff has been refused relief.

19. Where the subject matter of a suit in Ireland not brought to a hearing was the same as that of a suit instituted in the Court of Chancery in England, in which that Court had pronounced a decree refusing the relief sought by the plaintiff, this Court restrained the plaintiff from prosecuting the suit in Ireland (1).

This Court will permit proceedings in a foreign Court to go on, if they will enable it to dispose of the question more satisfactorily, but not where the adjudication of the foreign Court will preclude the question the plaintiffs may wish to raise.

20. If the proceedings in a foreign Court will enable this Court more satisfactorily to dispose of the question between the parties, this Court will permit such proceedings to go on to an adjudication; but it will not give such permission where the adjudication of the foreign Court between the parties there, whatever it may be, will preclude the question which the plaintiffs in this Court may think proper to raise against the plaintiffs in the proceedings in the foreign Court, and where the title of a party does not turn on the law of a foreign country in the first instance, though it may ultimately; but on a preliminary question (which this Court is not only as competent as the foreign Court to decide upon, and, according to the position of the parties, much more competent, inasmuch as this Court has all the parties before it), this Court will not allow the proceedings in the foreign Court to go on, involving the same question, with the chance of the two Courts

Where the title does not turn on the law of a foreign country, but on a preliminary question, which this Court is competent to decide, it will not allow the proceedings in the foreign Court to go on.

{(1) *Booth v. Leicester*, 1 Keen, 579; 3 My. & Cr. 459.

arriving at opposite conclusions; and an injunction to restrain proceedings in Demerara was granted under the circumstances of the case (1).

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21. If a suit to redeem is in progress in the Court of Chancery in this country, this Court will grant an injunction to stay proceedings on a bill to foreclose in a foreign Court (2).

If there is a suit to redeem in this country this Court will stay proceedings in a foreclosure suit in a foreign country.

22. A suit between a plaintiff residing in England against defendants also residing here to enforce a lien on immovable property of the defendants situate out of the jurisdiction of this Court, requires that some special state of circumstances should exist, in order to enable the Court to give any relief of this description; and where a director of a company, established in England to work some Prussian mines, had paid a large sum towards the purchase, and the vendor annulled the contract and resold the mines to a new company, the Master of the Rolls (Sir J. Romilly) dismissed a bill by the representative of the director to establish a lien on the estate for the advances, and for an injunction (3).

A suit between parties residing in England to enforce a lien on immovable property situate out of the jurisdiction, requires special circumstances to enable the Court to give relief of this description.

23. Where a privateer had taken a prize without having a letter of marque, and the Court of Admiralty had on that ground, by a sentence, declared her a *droit* to the Crown, the Court of Chancery refused with costs a motion to restrain the part-owners of the privateer from receiving, or the Registrar of the Admiralty Court from paying, the proceeds under a treasury warrant directing such payment (4). Lord Chancellor Eldon said: "The motion not only seeks to restrain those defendants from receiving, but desires this Court to enjoin the officers of the Court of Admiralty, called upon by the King's warrant to do an act, against obeying that warrant, and to order them to pay the whole money into the bank till the cause shall be heard and the accounts taken." He said: "When the prize is condemned, whatever has been the habit of the Crown, however that habit may create a reasonable expectation, which, upon the ground of an assertion made from the

(1) *Bunbury v. Bunbury*, 1 Beav. 7; 1 L. J. (Ch.) 5.

318; 8 L. J. (N. S.) Ch. 297; 3 Jur. 644.

(3) *Norris v. Chambres*, 29 Beav. 246.

(2) *Beckford v. Kemble*, 1 S. & S.

(4) *Nicol v. Goodall*, 10 Ves. 155.

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highest authority, that the Crown never does disappoint that expectation, has been held an insurable interest, no Court is authorized to look at the property as any other than as belonging to the Crown; and it would militate against the policy for which the right is vested in the Crown." That "the first question is, in what stage this Court is, upon the head of trust, to interpose? Is the Court to interpose by restraining the Registrar from obeying the warrant, the King having the property? Is this Court to interfere in the Court of Admiralty, and to lock up the fund, or require it to be paid into this Court? They are not trustees until they have received it according to the King's order;" and concluded his judgment by asking whether this Court was, before a trust was created under the King's warrant, to issue an injunction in such a case? In an *Anonymous Case* (1), the Court refused to grant an injunction which would defeat the statute respecting prizes; nor will the Court grant an injunction where the Admiralty has jurisdiction to determine whether a document has been obtained by duress and imprisonment, and is able to suppress it of its own authority; therefore, where the owners of two privateers seized upon a ship as a lawful prize, it appearing by her papers that she had carried provisions to the enemy, and the captain signed a note acknowledging that they had justly confiscated his cargo; and afterwards the captain filed a bill for an injunction to stay a suit in the Admiralty Court on the lawfulness of the transaction, suggesting that some of the papers were lost, and that if the note should be produced which he was compelled to give, he should be cast at Law, the Court refused the injunction (2).

24. Where an administratrix had an equitable demand against the personal estate of her intestate, the Court would restrain the next of kin from proceeding in the spiritual Court to compel a distribution; but they might have proceeded in the spiritual Court to compel the administratrix to exhibit an inventory (3).

25. In *Goscoyne v. Chandler* (4) an injunction was granted to restrain proceedings in the Ecclesiastical Court to set aside a will, contrary to agreement. If the validity of a will had

(1) 3 Atk. 350.

(2) *Ib.*

(3) *Buckhouse v. Hunter*, 1 Cox, 342.

(4) 3 Sw. 418; Dick. 28.

been already determined, and it had been acted upon, Equity would restrain proceedings in the Prerogative Court to controvert it (1).

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26. A mere defect in pleading, though ground of general demurrer, will not, after verdict, render a judgment null and void, where a good cause of action is stated in the count. And where a declaration on a colonial judgment framed in assumpsit, did not aver the plaintiff's readiness to perform his part of the contract, but disclosed a good cause of action for malfeasance, the Court held that a Court of Equity would not treat the judgment as void, though the objection to the declaration might have been good on general demurrer; but the time for appealing from the judgment having elapsed, the Court gave time to the parties to apply to the Judicial Committee of the Privy Council in England for liberty to appeal, or to apply to a Court of Law for liberty to plead to an action which had been commenced on the judgment (2).

A Court of Equity has jurisdiction to give time to apply to the Privy Council for liberty to appeal, or to a Court of Law for liberty to plead to an action on a judgment.

27. The Court of Session (Scotland) has no power to alter, vary or discharge any order of the Court of Chancery made under the jurisdiction of the Great Seal, which is as much the Great Seal of Scotland as of England (3).

28. The Court of Chancery will not refuse to interfere when the remedy is more complete and perfect in Equity than it is at Law (4); nor will the Court refuse to entertain a suit which is properly instituted, or to protect the owner from being harassed by double proceedings at Law and in Equity, merely because the effect of its interference is to give a married woman that equity to a settlement which she could not otherwise obtain (5).

The Court will not refuse to interfere when the remedy is more complete and perfect in Equity than at Law.

29. Where A. had assigned a policy on his own life, effected in an insurance office having offices both in England and Scotland, to B., as a security for moneys advanced, and notice was given to the office of the assignment, and A. and B. were both resident and carried on business in London, but the former had also a place of business in Scotland, where his estate became sequestered; and C.

(1) *Sheffield v. Buckinghamshire* (Duchess of), 1 Atk. 628; *vide* ante. Giff. 582; 4 Macq. H. L. C. 1; *vide* S. C. p. 1009, *ante*.

(4) *Duncombe v. Greenacre*, 8 W. R.

(2) *Jack v. Tease*, 12 Ir. Ch. Rep. 279. 657; 6 Jur. (N. S.) 987; *vide* S. C.

(3) *Bute (Marquis) v. Stuart*, 2 p. 630, *ante*.

(5) lb.

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was appointed trustee for his creditors; and on the death of A. proceedings were instituted in Scotland by C. against B. for an account, and he also sued out a writ of arrestment *jurisdictionis fundandæ causâ*, to attach the moneys secured by the policy in the hands of the company; and B. appeared in this suit, but before putting in any answer commenced proceedings in Chancery in England against C. and the company; an order was made in the suit, in which C., the trustee, appeared, that the money should be paid into Court, but without prejudice to the Scotch proceedings; and on motion for a decree, however, B. was declared entitled to a lien on the policy, and an account was directed to be taken of what was due to him under his assignment; and the parties attended before the Chief Clerk, who, by his certificate, found that the sum due to B. exceeded the amount payable under the policy; and upon this certificate Vice-Chancellor Sir W. P. Wood had ordered the fund in Court to be paid to him, and on appeal the orders appealed from had been affirmed; Lord Chancellor Campbell held, that the decree directing the inquiry was erroneous, and that the proceedings in Chancery should have been restrained until the Scotch suit had been determined; but as C. had been guilty of laches in prosecuting his appeal, and had somewhat acquiesced in the proceedings by going before the Chief Clerk upon the inquiry, the appeal must be dismissed (1).

An administration decree in a Court of limited jurisdiction does not disentitle to an administration in a Court of general jurisdiction, but, under circumstances, proceedings will be stayed in the latter Court.

The Court of Chancery had jurisdiction to adjudicate on the rights of adverse

30. Although the fact of an administration decree having been obtained in the Court of Chancery of the county palatine of Lancaster, is not a ground for staying proceedings in a Court of general jurisdiction for the administration of the same estate, where a portion of the estate is situate beyond the jurisdiction of the Lancaster Court; yet, on appeal, the Court ordered all the proceedings in the suit in Chancery to be stayed, the plaintiffs to have the conduct of the suit in the Court of limited jurisdiction, they appearing in that Court for that purpose (2).

31. The Court of Chancery had jurisdiction to adjudicate on the rights of adverse claimants to a fund in the Insolvent Debtors Court. And where an assignment had been made for value, by an insolvent, of the surplus of his property which might remain after

(1) *Venning v. Lloyd*, 6 Jur. (N. S.) 81.

(2) *Wynne v. Hughes*, 5 Jur. (N. S.) 165; 28 L. J. (Ch.) 283; 32 L. T. 326.

payment of his debts under that insolvency, and subsequently to that assignment he again became insolvent, the Court of Chancery made a decree declaring the right of the purchaser under such assignment to the surplus which remained in the Insolvent Debtors Court after payment of the insolvent's debts under his first insolvency, as against the assignee in insolvency, who claimed such surplus for the benefit of the creditors under the second insolvency (1).

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claimants to a fund in the Insolvent Debtors Court.

32. The old rule that the Court would not admit a bill of discovery in aid of the jurisdiction of the Ecclesiastical Court, is not applicable to a bill for discovery in aid of proceedings in the Probate Court, that Court not having the same power of compelling discovery as the Ecclesiastical Court had. And where an heir-at-law, having been cited to see proceedings commenced in the Probate Court, for the purpose of proving the testator's will in solemn form, filed several pleas denying the validity of the will, and filed a bill of discovery in aid of his pleas, and moved for an injunction to stay proceedings until answer; although, interrogatories not having been filed, the motion was refused with costs, yet leave was given to move on a future day, after the interrogatories should have been filed (2).

The old rule that the Court would not admit a bill of discovery in aid of the jurisdiction of the Ecclesiastical Court, is not applicable to a bill for discovery in aid of proceedings in the Probate Court, that Court not having the power of compelling discovery as the Ecclesiastical Court had.

33. In *Griffith v. Edwards* (3) it is *queried*, by Vice-Chancellor Sir J. Stuart, whether an explanation of the nature and effect of a writ upon service be dispensed with by the provisions of the Common Law Procedure Act; and if so, whether a Court of Equity would, if any surprise were to arise in consequence, relieve against such surprise.

34. Where the plaintiffs were equitable mortgagees of the shares of J. H. in the Woollen Cloth Company, and the Dhobah Company were general creditors of J. H., both companies having notice of the plaintiffs' right; and the Dhobah Company commenced proceedings in the Lord Mayor's Court, and attached the dividends on the shares in the hands of the Woollen Cloth Company; and the same solicitor was employed for both companies, and no defence

If equitable incumbrancers on shares in a company neglect to make themselves legal owners, or to obtain possession of the profits arising from the

(1) *Cook v. Sturgis*, 5 Jur. (N. S.) 475; 28 L. J. (Ch.) 345.

(3) 2 Jur. (N. S.) 584; *vide* S. C. p. 1073, *post*; *et vide* *Edwards v. Griffith*, 15 C. B. 397.

(2) *Fuller v. Ingram*, 5 Jur. (N. S.) 510; 7 W. R. 302.

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shares, this Court will not assist the equitable mortgagees to get back a sum which more active creditors have taken in execution by means of the process in the Lord Mayor's Court.

was made, and the Dhobah Company obtained payment; the Master of the Rolls (Sir J. Romilly) held that the plaintiffs could not recover them back from either company; but that the Dhobah Company could not avail themselves of a similar attachment in the Lord Mayor's Court obtained pending this suit; and that the plaintiff was entitled to a receiver of the future dividends (1). The Master of the Rolls said: "I am of opinion that in the absence of all proceedings the right of the plaintiffs to the dividends in the hands of the Patent Woollen Cloth Company which had accrued due on the shares of J. H., was preferable to that of the Dhobah Sugar Company. The plaintiffs were as much equitable incumbrancers or mortgagees of the shares and dividends as J. H. could make them, and the Dhobah Sugar Company were merely general creditors of J. H., having no right or title to these shares over and above what every creditor has to the property of his debtor. But although I have formed this opinion, I have also come to the conclusion that the defendants in these proceedings did nothing more than they were entitled to do, and that no equity exists to compel any of them to make good or refund the amount of these two dividends." And further on, he said: "I think that until the plaintiffs took some active steps, either at Law or in Equity, to enforce their right to the dividends on these shares, the Patent Woollen Cloth Company was not bound to regard an assignment which the assignees declined to act upon." And that: "The plaintiffs were, in fact, equitable incumbrancers on the shares, with a power, if they thought fit, to make themselves the legal owners, or to obtain possession of the profits arising from them, by application to this Court for the appointment of a receiver. They have not thought fit to do so, and the consequence has been that more active creditors, by means of the process in the Lord Mayor's Court, have taken this sum in execution; and it is not, in my opinion, now to be got back, either from the Patent Woollen Cloth Company or from the Dhobah Sugar Company."

If fraud can be pleaded to an action, a Court of Law is the proper tribunal.

35. Where the plaintiffs, through the introduction of R., had entered into a contract with B. de M., for the supply of certain goods, and during the negotiations for a second contract R. falsely represented that B. de M. would not complete it without the

(1) *Anderson v. Kemshead*, 16 Beav. 329, 339, 341, 343.

advance of an extra sum by the plaintiffs, on which R. was also to have a commission; and the plaintiffs accordingly paid R. a sum of money in part discharge of what was due for such commission, and gave him a letter undertaking to pay the rest; and they subsequently discovered the fraudulent representations; and on R. bringing an action on the letter of undertaking against the plaintiffs, they filed a bill to restrain the action and to make him deliver up the letter of undertaking; Vice-Chancellor Sir R. Malins held, that there was no equity in the bill; that the fraud could be pleaded in the action; that a Court of Law was the proper tribunal, a jury being able to appreciate the value of the evidence; and that there was no equity to compel R. to give up the letter of undertaking (1).

36. A Court of Equity will interpose to correct or prevent the abuse of the process of Common Law Courts(2); but Equity restrains proceedings at Law, when necessary to the attainment of justice, not by assuming jurisdiction over the Courts in which the proceedings are pending, but by controlling the parties to such proceedings by injunction (3). "Injunction to restrain proceedings at Law is one of the most common heads of Equity jurisprudence. It is a preventive remedy. It is not used for the purpose of punishment, or to compel persons to do right, but simply to prevent them from doing wrong. Where the right of the plaintiff is doubtful, or where he has an adequate remedy at Law, injunction will not be granted; but where the right is clear, and the danger probable that the right will be defeated without this special interposition of the Court, it will in general be granted" (4). The limitations to the rule, that an injunction will not lie to restrain a suit at Law, where the plaintiff in Equity has a good legal defence to such suit, are well illustrated in a case in Connecticut (U.S.). In an application for an injunction against a suit at Law, founded upon an alleged discharge or satisfaction of the claim sued on, the Court remarked as follows: "Even if this settlement was not founded on a good pecuniary consideration, as it certainly is, it might be received as a family settlement, and as such it should be sustained and upheld in a Court of Equity, and viewed in that character;

Equity corrects and restrains the abuse of the process of Common Law Courts, but Equity does not assume jurisdiction over the Courts, but controls the parties. Injunction is a preventive remedy. Where the right of the plaintiff is doubtful, or where he has an adequate remedy at Law, no injunction is granted.

(1) *Fennelly v. Ranscelot*, 19 W. R. 966.

(3) *Burpee v. Smith*, Walker, Ch. 327 (Amr.)

(3) *Morris v. Thomas*, 17 Ill. 112 (Amr.)

(4) *Per Woodward, J.*, in *Miller v. Gorman*, 38 Penn. 312, 313 (Amr.)

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if one part of it is good, every other part is equally so, as there is the same general consideration for the whole. But, it is said, if we hold that the petitioner is released from the debt, there is a good defence of the action at Law, and for that reason a Court of Equity should not interfere by injunction. This may possibly be so. A plea could, perhaps, be so framed in that action as to present this discharge as a sufficient answer to the plaintiff's declaration; still, the writing is not a technical discharge, and we think the remedy is not so clear, certain, and adequate as that, in the exercise of a sound discretion, we ought on that account to dismiss the bill, and hand the case over for further investigation elsewhere; nor would such a course be of the least benefit to the respondents. The effect of the writing is a question of law, and not of fact, and a trial by jury, or in a Court of Law, would not enable the administrators to escape the legal construction which the Court in any case will give it" (1).

Equity will restrain the introduction of evidence in a suit at Law, if manifestly contrary to right and justice.

37. Equity will restrain by injunction, not only the suit at Law itself, but also the introduction of evidence in such suit which, though perhaps legally admissible, is manifestly contrary to right and justice. Thus, where the defendants took land of the complainant under a charter, and the appraisers, in his absence, being misled as to some material facts, appraised the damage at one dollar, when it really amounted to five thousand dollars; it was held that Equity would enjoin the use of the appraisers' record by the defendants in an action at Law for damages. The formal regularity of the proceedings was held no objection to this interposition, but rather an additional ground, as depriving the party of any remedy at Law; and it was also held that a new appraisalment should be made under the direction of the Court, and the injunction should stand until the damages thus awarded were paid (2).

Equity sometimes aids a suit at Law.

38. Equity will sometimes aid as well as restrain a suit at Law by injunction. Thus an injunction will be granted to restrain the assignor of an equitable claim from dismissing a suit for such claim, brought in his name by the assignee (3). So where suits had been brought before a magistrate against the drawers of prizes in a

(1) *Per Ellsworth, J., in Hurlbut v. Phelps*, 30 Conn. 50 (Amr.)

(2) *Wells v. Bridgeport, &c.*, 31 Conn. 316 (Amr.)

(3) *Deaver v. Eller*, 7 Ired. Eq. 24 (Amr.)

lottery, for the purpose of a forfeiture to the State under the Statute (U.S.), it was held, that the district Courts might enjoin the owner of the lottery from disposing of such prizes until the suits should be decided (1). So, in a case of necessity, the Court will interfere to prevent the defendant from affecting property in litigation by contracts, conveyances, or other acts; or order security therefor (2). Thus where A. sued B. and C. in trespass, for malicious injury to his property, and he then filed a bill in Equity, alleging the facts of the trespass, and that B. and C. were engaged in it, and that they were disposing of their property to avoid its being taken to satisfy his judgment, and he also prayed for a discovery; it was held, that the ancillary jurisdiction of a Court of Equity was properly invoked, though the defendants need not answer anything tending to criminate them (3).

- (1) *People of Kent v. Kent*, 6 Cal. 161 (Amr.); 8 Rich. 349.
 89. (3) *Cottrell v. Moody*, 12 B. Morr.
 (2) *Miller v. Washburn*, 3 Ired. Ch. 500 (Amr.)

CHAPTER II.

REAL PROPERTY (INCLUDING LEASEHOLDS).

PART II.

SECT 1. *Ejectment.*

The Court will not restrain proceedings in ejectment before judgment, except where parties are in trade.

The Court will restrain proceedings by a party who would be a constructive trustee against a person having a good legal and equitable title.

The jurisdiction of the Court extends to remove any impediment to the fair trial of the real question, but not to the trial of the question.

1. The Court will not grant an injunction to restrain proceedings in ejectment before judgment has been obtained in such proceedings, except where parties are in trade ; in that case the Court will, to prevent the inconvenience which would arise by the recovery of a judgment against them, grant an injunction to stay proceedings at Law before judgment obtained (1).

2. Where there is a legal as well as an equitable title in a defendant to an ejectment, the Court will, at his suit, restrain the proceedings in the action by a party who, if successful, would be a trustee for him ; although there may be a question whether he would not be successful at Law ; thus, if A. is in possession of an estate by a good equitable title, and the legal estate, if not in himself, is in B. as a constructive trustee for him, and B. brings ejectment, A. is entitled to relief by way of injunction, whether the legal estate be in him or not (2).

3. The jurisdiction of the Court extends to remove any impediment to the fair trial of the real question at Law, but not to the trial of the question ; therefore where G., being, as absolute owner, in possession of a farm, was served with a writ of ejectment, which writ he, being, as he alleged, illiterate, was unable to read ; and having been, by the person who served it, misinformed as to its nature, he suffered judgment to go by default ; and subsequently, to avoid being turned out of possession, signed a memorandum of agreement for a lease, whereby he, G., agreed to take the farm from the defendant (the plaintiff in the ejectment) for four months

(1) *Hudson v. Temple*, 9 W. R. 243.

(2) *Crofts v. Middleton*, 8 De G. M. & G. 192 ; 25 L. J. (Ch.) 513.

at a fixed rent; and G. afterwards attempted to set aside the judgment on the ground of surprise, but was met at Law by the objection that he had waived all irregularities by attorning to the plaintiff (the defendant in Equity); and G. filed a bill praying for a declaration that he was, as the heir of E., absolutely entitled in fee simple in possession, and that the memorandum of agreement might be delivered up to be cancelled, and an injunction granted to restrain the defendant from proceeding at Law, either upon the agreement or the judgment; the Court restrained the defendant from proceeding upon the judgment, and from setting up the agreement in any action or other proceeding at Law in respect of the property (1).

4. If, after a suit has been instituted for the purpose of establishing the trusts of a will, and a decree made in favour of the plaintiffs, persons claiming an interest adverse to the plaintiffs commence an action of ejectment against them for the purpose of disputing the will, the Court will grant an injunction to restrain such action, and that, although no injunction was prayed in the suit, and upon petition only (2).

The Court will restrain ejectment against the plaintiff after a decree establishing the trusts of a will and in favour of the plaintiff.

5. Where an equitable tenant for life, being in possession of the estate with his lessee, had committed waste, and refused to permit the trustee to examine the condition of the land, the Court refused to continue an injunction to restrain an action of ejectment by the trustee, even on the plaintiff undertaking to cut no more timber and to permit the inspection (3).

6. Where in suits by creditors and legatees, a receiver had been appointed of the rents and profits of real estate, part of which was copyhold, the death of the last tenant having been duly presented at the court baron of the manor, and proclamations had been made for the next tenant to come in and be admitted, and no person appearing the bailiff had been ordered to seize the lands *quousque*, and a declaration in ejectment at the suit of the lord had been afterwards served on the terre tenant; on a motion of the receiver the lord was restrained by injunction from prosecuting the action (4).

Where a receiver has been appointed in a creditors' and legatees' suit, the Court will, upon a seizure *quousque*, restrain ejectment on the terre tenant.

(1) *Griffith v. Edwards*, 2 Jur. (N. S.) (Ch.) 352.
(N. S.) 584.

(3) *Pugh v. Vaughan*, 12 Beav. 517.

(2) *Turner v. Turner*, 19 L. J.

(4) *Evelyn v. Lewis*, 3 Hare, 472.

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The Court will restrain ejectment against a purchaser of a lease taken in execution under a *fi. fa.* put into possession by the sheriff, without an assignment of the term.

7. Where the goods of the defendant, and the lease of certain premises belonging to him, had been taken in execution under a *fi. fa.* and sold, and the plaintiff became the purchaser of the term, and was put into possession of the premises by the sheriff, but no assignment of the term had been otherwise made, and the defendant afterwards brought ejectment and recovered; the plaintiff upon filing his bill to restrain proceedings in the ejectment, and moving for an injunction upon the answer, by which the defendant, admitting the plaintiff's case, insisted upon alleged irregularities in the execution of the *fi. fa.*, which it was argued, rendered the proceedings in that execution invalid in Law; the Court granted the injunction, with liberty to the plaintiff to take such proceedings at Law as he might be advised to perfect his title (1).

8. Where a yearly tenant, having the option of purchasing the property, filed his bill against the landlord for a specific performance of the contract for sale, and the landlord having proceeded to eject the plaintiff, the latter applied for an injunction; the Court refused to grant it, except on the terms of the plaintiff undertaking to continue to pay the rent without prejudice (2).

9. To a bill to restrain an ejectment, the tenant must be made a party, unless the landlord has been admitted to defend the action (3).

10. Although in *Clancy v. Roberts* (4) it was held that it is only in a strong case, if at all, that the Court will grant an injunction to restrain proceedings for non-payment of rent; yet in *Lovat v. Lord Banelagh* (5), relief was given against a breach of a covenant for non-payment of rent, and the lessor will therefore be compelled to proceed on some other covenant against the breach of which this Court will not relieve. On a bill in Equity by a tenant for relief, who had allowed judgment in ejectment for breach of covenants for non-payment of rent, &c., to go by default, the Court relieved against the judgment on the terms of payment by the plaintiff of the taxed costs at Law, the arrears of rent, the amount

(1) *Jones v. Hughes*, 1 Hare, 383; *Lawley v. Walden*, 3 Sw. 142.
and see *Doe v. Jones*, 1 Dowl. (N. S.)

352; 9 M. & W. 372.

(4) 1 Ir. Eq. Rep. 21.

(2) *Pyke v. Northwood*, 1 Beav. 152, pl. 7.

(5) 3 V. & B. 30; *et vide ante*, p. 58,

(3) *Poole v. Marsh*, 8 Sim. 528;

due for repairs and insurance, and £50 costs in Equity, and ordered the defendant to account to the plaintiff for the rent received by him (1).

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11. An injunction to restrain proceedings in an ejectment until the hearing will not be granted except the defendant at Law give a complete judgment at Law; and where one of two defendants at Law, who was not a party to the suit, refused to do so, the Court refused the injunction (2).

The Court will not restrain ejectment except defendant at Law give a complete judgment at Law.

12. A lessee, proceeded against by ejectment, who has received notice from a claimant, disputing his landlord's title, not to pay him any more rent, and has been threatened with distress by the landlord if he does not pay rent, cannot restrain either the ejectment by the claimant or the distress by his landlord; a tenant cannot be allowed to dispute his landlord's title (3).

A tenant cannot dispute his landlord's title, and can have no injunction against a distress by his landlord, or an ejectment by a claimant.

13. Where the tenant had himself violated the conditions of an agreement for a lease of a farm, under which he had taken possession, and the landlord brought an ejectment against him; upon a bill filed by the tenant for a specific performance of the agreement, and to restrain proceedings at Law, the Court refused an injunction (4).

14. Where the defendant had been prevented from proving other breaches against which no relief could have been had, as by assigning without license, the Court refused an injunction against a verdict in ejectment upon a breach of covenant by the lessee for years, as to the mode of cultivation, though the case was one in other respects admitting relief (5).

15. There is a distinction as to an injunction to restrain ejectment between landlord and tenant upon an actual lease, and upon a mere covenant for a lease; in the latter case the Court will grant no relief if the lease sought must contain a covenant which would have been violated, and against which no relief could be had. In the former case some ground is necessary, either by the conduct of the lessor, or under the 4 Geo. 2, c. 28 (6).

The Court will grant no relief against ejectment upon a mere agreement for a lease where the covenant would have been violated.

(1) *Bamford v. Creasy*, 3 Giff. 675.

(4) *Porrett v. Barnes*, 2 L. J. (Ch.)

(2) *Redmond v. Goodall*, 2 Jones, 142.

812.

(5) *Lovat v. Lord Ranelagh*, 3 V. &

(3) *Homan v. Moore*, 4 Price, 5.

B. 24.

(6) *Id.* 29; *vide ante*, p. 58, pl. 7.

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SECT. I.

The Court will restrain ejectment under a deed of appointment obtained by husband from wife by undue influence, oppression, &c.

16. An injunction will be granted against an ejectment under a deed of appointment, if a husband obtain such from his wife by undue influence, oppression, &c., and an issue will be directed (1).

A landlord suffering, by default, judgment in ejectment, may restrain tenant, &c., from setting up a lease against his, the landlord's, ejectment.

17. A landlord against whom judgment has been obtained in ejectment by his own negligence in suffering judgment to go by default, has an equity to restrain his tenant, and those to whom the tenant has attorned, from setting up the lease against any ejectment the landlord may bring, and that, though only a year and three quarters of the term may be, as here, unexpired; and it is not necessary that the ejectment should be brought before the bill is actually filed (2).

Surviving partner will be restrained proceeding by ejectment to recover a farm

18. A surviving partner proceeding by ejectment to obtain possession of a farm, of which a joint lease had been made to himself and his deceased partner, will be restrained by injunction (3). of which he and his deceased partner were joint lessees.

The Court will restrain ejectment in a case of acquiescence.

19. In a case of acquiescence the Court will restrain ejectment. And where a colliery proprietor constructed a railway from his colliery across the lands of several other persons by agreement; and his solicitors wrote a letter to the defendant, across whose lands he desired to carry the railway, referring to the powers of a local Act of Parliament, supposed to enable him to take lands within a certain area for roadway, and offering, on the part of the plaintiff, to pay him for the land at a fair valuation; and the defendant did not reply to the letter, and the railway was made across his land without further communication with him; and a year or two afterwards the plaintiff and defendant had an interview, but did not agree as to the price to be paid for the land; and three or four years after the railway was made the defendant brought his ejectment, whereupon the plaintiff filed his bill for an injunction, charging acquiescence; the Court, on motion, restrained the action, upon the plaintiff giving judgment in the ejectment, and paying a sum into Court not less than the utmost valuation of the land (4).

20. Where the plaintiff, at the suggestion of the defendant,

(1) *Peel v. —*, 16 Ves. 157.

(3) *Elliot v. Brown*, 3 Sw. 489.

(2) *Baker v. Mellish*, 10 Ves. 544.

(4) *Powell v. Thomas*, 6 Hare, 300.

removed his place of business to a house belonging to the defendant, his father-in-law, upon the faith, as he alleged, of a parol promise by the defendant that he should occupy the house rent-free during his life; and during the period of his occupation, nineteen years, he spent various moneys, amounting to about £300, in repairs, which were chiefly of the ordinary description, except the putting up a new staircase, and a new roof to an outhouse; and the defendant brought an ejectment, and the plaintiff filed a bill for relief, alleging that there was an absolute gift of the house to him; the Master of the Rolls, Sir J. Romilly, held that there was not, and that the change of the plaintiff's place of business did not constitute, a sufficient consideration to support the parol agreement, and also that the plaintiff was not entitled to any lien in respect of the moneys spent in repairs (1).

21. Upon a bill of discovery in Equity, in aid of an action, the plaintiff is only entitled to a discovery of such matters as make out his own title, and cannot compel a discovery of the particulars of his adversary's title, and how he makes it out; therefore, where A. brought an ejectment against B., whereupon B. filed a bill of discovery in Equity against A., seeking to discover under what title he claimed at Law, and how he made it out, the Master of the Rolls, Sir J. Romilly, held that B. was not bound to give this discovery (2).

Plaintiff in a bill of discovery is only entitled to discovery of matters making out his own title, not his adversary's; and plaintiff in Equity has no right to discovery of

plaintiff at Law's title in an action of ejectment against plaintiff in Equity.

22. Where there is concealment and acquiescence, together with conduct which creates an estoppel, a Court of Equity will restrain an ejectment; and where D.'s father died in 1847, having first made his will, purporting to devise all his real estate to his wife in fee, but this will was not executed in proper form, and therefore D. became entitled to the land as heir-at-law to his father; and three months before he came of age he agreed with one P. for the sale to him of the real estate for valuable consideration; and a conveyance to P. was prepared by D., and executed by his mother, the devisee under his father's will, D. being the witness to it; and P. afterwards sold and conveyed away his interest, and D. brought ejectment against the purchaser; on a bill filed to restrain

Where there is concealment and acquiescence, with conduct creating an estoppel, a Court of Equity will restrain ejectment.

(1) *Millard v. Harvey*, 34 Beav. 125; vide S. C. *ante*, p. 210, pl. 15; 237; 10 Jur. (N. S.) 1167; 13 W. R. p. 559, pl. 4; p. 673, pl. 23.

(2) *Ingilby v. Shafto*, 33 Beav. 31.

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the action, it was shewn that D. had at various times acquiesced in the sale after he became of age. The Court held, that D.'s conduct with reference to the sale was fraudulent, and was to be considered as an assertion that his mother was entitled as a devisee in fee, although he was then not of age, and that such conduct, and his subsequent acquiescence after attaining his majority, estopped him from denying the validity of the sale, and he was enjoined from proceeding with the ejectment, and ordered to execute a conveyance to P.'s vendee (1).

An ejectment will be restrained which is in violation of a custom under which possession is given of land with a view to the grant of a lease.

23. An ejectment will be restrained which is in violation of a custom under which possession is given of land with a view to the grant of a lease. And where R. was tenant in fee of estates in Yorkshire, upon which the custom had grown up of permitting a person desiring to take land, or building, to enter upon such land and build thereon, upon an understanding that, after the erection of buildings a lease would be granted for sixty years, renewable every twenty and forty years upon payment of fines, and to continue in possession of such lands upon simple payment of rent, without the actual taking up of any lease; but if a lease was actually granted, the custom was to reserve a rent double that which would otherwise have been required; and in 1837, on the application of the plaintiff, a piece of land, parcel of these estates, was allotted to T. in manner described above, and T. entered into possession and built on the land; and R. died in 1839, having devised his estates at H. to trustees for the defendant for life, with power to his guardians and himself to grant the usual building leases, and also to grant leases upon such terms as those upon which leases had previously been granted, and to renew leases upon the existing system; and the defendant obtained a private Act of Parliament in 1844, which, after reciting that, on the estates persons applied for land on lease for building purposes, and had taken land for such purposes without written agreement, but on the faith of a lease being granted to them in the customary form, namely, for the term of sixty years, renewable every twenty and forty years, upon payment of fines, authorized the granting of such leases; and in 1845, another piece of land was allotted to T. by the agent of the trustees, and he entered and built thereon; and in November,

(1) *Leary v. Rosc*, 10 Upper Canada Law Journal, 272 (Ch.).

1861, the defendant commenced an ejectment to recover both pieces of land; Vice-Chancellor Sir J. Stuart held, that the plaintiff was entitled to a lease of both pieces, to be granted in the manner prescribed by the Act of 1844, but that the rent reserved should be double the amount of that at which T. entered into possession, such double rent to commence to be payable from the date of the lease (1); but this decree was reversed by the House of Lords on the ground that the circumstances shewed merely a tenancy from year to year, and no title to compel a lease (2).

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24. The Court will relieve against the consequences of a breach of covenant to repair where the lessee is unable, from circumstances over which he has no control, to complete the repairs within a specified time. A lease contained a covenant to repair within three months after notice, and if the lessee should not perform the covenant it might be lawful for the lessor to re-enter. On the 16th of September, 1862, the lessee received a notice requiring her to perform, within three months, certain repairs, and she thereupon directed three persons to execute the works which might be necessary, but two of them were, in consequence of the bad state of the weather, prevented from completing portions of the works by the 16th of December. The lessor's solicitor, on the 20th of December, demanded possession of the premises, on the ground that the lease had become forfeited, and on the 30th of December an ejectment was commenced for a breach of covenant in not completing the repairs before the 16th of December. But on a bill by the lessee shewing these circumstances, and that, out of the twenty-two items mentioned in the specification sent by the lessors of repairs required, only two were not commenced, and eight not completely finished; and that there had been no entry by the lessors to inspect, and no notice from them to expedite the works during the interval; and that the whole of the works was completely finished in the second week in January; the Court held that the lessee was entitled to be relieved against an ejectment for the breach of covenant, and granted a perpetual injunction to restrain

The Court will relieve against the consequences of a breach of covenant to repair, where lessee is unable from circumstances to complete repairs within the specified time, and the Court will restrain an ejectment for such a breach.

(1) *Thornton v. Ramsden*, 4 Giff. 519; 10 Jur. (N. S.) 839.

(2) *Ramsden v. Dyson and Thornton*, L. R. 1 H. L. 129; *et vide Thornton*

v. Ramsden, and *Ramsden v. Dyson and Thornton*, *ante*, pp. 224, 225, pl. 51; pp. 654, 655, pl. 8.

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Where there has been a waiver by a mortgagee, of default by the mortgagor, the Court will restrain ejectment.

the action, and directed an inquiry whether the covenants had been performed (1).

25. Where there has been a waiver by a mortgagee, of default by the mortgagor, the Court will restrain an ejectment. In this case an agreement had been entered into, in writing, not to call in a mortgage for two years, the mortgagor fulfilling his covenants. On one occasion within the two years interest was not paid on the day, and the mortgagee shortly afterwards, after giving notice that he was no longer bound by the agreement, demanded and received payment of the interest and incidental costs. Upon the mortgagee bringing ejectment within the two years the Court granted an injunction (2).

26. Where a lease had been granted of coals and ironstone for three hundred years at a fixed rent, and paying certain royalties not fixed, and the lease contained a stipulation that the working should not be delayed more than five years from the date of the lease; also, that as to three out of four of the mines, the lessees might either work or relinquish, but should not underlet or assign without the consent of the lessor, except to responsible persons; and the mines had been worked for twenty-four years, when the lessee died, and a suit was instituted to administer his estate and a receiver appointed; and the ironstone mine was then no longer worked, and ten years after the working of the coal mines was also stopped, but rent continued to be paid and received; and a correspondence ensued, not assuming a peremptory tone until fifteen years after the mines were shut up, the lessors having had no knowledge of the abandonment all along; and an ejectment had been brought, but restrained by reason of there being a receiver; on summons for liberty to proceed with the action, Vice-Chancellor Sir R. T. Kindersley held, that the lessors had no right to prohibit the letting to responsible persons, and that, by acquiescence with knowledge of the breaches of covenant, and the receipt of rent, they had lost their right to proceed to recover possession immediately, but must give the lessees a reasonable time for restitution of the works; and the application for

(1) *Burgent v. Thomson*, 4 Giff. 473; (2) *Langridge v. Payme*, 2 J. & H. 9 Jur. (N. S.) 1192; 7 L. J. (N. S.) 365; 423.
vide ante, pp. 87, 88, pl. 46, 47.

liberty to proceed at Law was ordered to stand over for three months (1).

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27. Where a mortgagee with power of sale of real estate had informed the plaintiff, the mortgagor, that he should sell it for £220 unless more were offered; and it was thereupon verbally agreed between the plaintiff and the defendant that the defendant should buy it on the plaintiff's behalf for £230, and have a lien on it for that sum, and that the plaintiff should pay interest and continue to occupy the part he then occupied, and that the defendant should receive the rents of the rest to reduce the principal; and an offer by the defendant to purchase for £230 was then sent by the plaintiff's agent to the mortgagee, who accepted it, and under his power of sale conveyed to the defendant's infant daughter, by the defendant's direction; and the plaintiff continued in occupation of the part he was to occupy and paid interest, the defendant receiving the rents of the rest; and this continued for about ten months, when the defendant died, and after his death the daughter brought ejectment, claiming to be absolute owner; the Court held, that the Statute of Frauds was no defence to a bill by the plaintiff to enforce the agreement (2); and, *per* Lord Justice Knight Bruce, the plaintiff's continuance in possession after the conveyance being referable only to the verbal agreement amounted to part performance of that agreement and excluded the operation of the statute (3); and, *per* Lord Justice Turner, without reference to part performance, the Statute of Frauds was no defence, because the defendant's insisting on the conveyance as absolute when it had been agreed that it should be a mortgage was a fraud, and the Statute of Frauds is not allowed by Courts of Equity to cover frauds (4).

28. Where the defendant had agreed, in consideration of the plaintiff erecting a house and premises upon a plot of ground belonging to the defendant, to grant a lease of the same when completed, according to the terms of the agreement; and the plaintiff agreed to insure the house and premises in the County Fire Office in the joint names of the plaintiff and defendant, pro-

(1) *Whitehead v. Bennett*, 9 W. R. 626; 4 L. T. (N. S.) 818.

(2) *Lincoln v. Wright*, 4 De G. & J. 16.

(3) *Ib.*

(4) *Ib.*

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vided that, if the plaintiff should not fully perform his agreement, then the agreement by the defendant for executing a lease should be void, and the defendant should have power to re-enter; and the defendant further agreed that the plaintiff should, within two years from the date of the agreement, have the option to purchase for a stipulated sum; and the plaintiff erected the house and premises in accordance with the terms of the agreement, but insured them in the Royal Exchange Insurance Office, and in his own name only; and the plaintiff, within the time limited, signified his intention to purchase, but the defendant refused to sell, on the ground of the breach of covenant, and commenced an action of ejectment against the plaintiff; upon a bill filed by the plaintiff, the Master of the Rolls held, that the contract to sell was a distinct and separate part of the agreement, and made a decree restraining the ejectment, and for the specific performance of the agreement for purchase (1).

29. Where an owner of a first rent-charge on house property which had fallen into decay had entered into possession, his rent-charge being in arrear, and having expended a considerable sum of money in repairs, he received rent sufficient to pay all arrears of the rent-charge; and thereupon the owner of a second rent-charge, whose rent-charge was in arrear, brought ejectment to recover possession; the Lords Justices, affirming the judgment of the Master of the Rolls, dismissed for want of equity a bill by the defendant to restrain the action, except upon payment of the money expended in repairs (2).

30. Where a lease had been granted of copyhold houses and lands in London for twenty-one years, subject to a small rent, and to the usual covenants to repair, insure, &c., with the usual proviso for re-entry on breach of any of the covenants, and also a covenant by the lessor, provided the rent should have been paid and the covenants kept, at the request in writing of the lessee to procure from the lord of the manor a license to demise the premises for the further term of twenty-one years, and so from time to time, provided such request should be given as aforesaid; and in obtaining such license to grant a new lease with the same cove-

(1) *Green v. Low*, 2 Jur. (N. S.) 848.

(2) *Hooper v. Cooke*, 20 Beav. 239; 1 Jur. (N. S.) 949; 2 Jur. (N. S.) 527.

nants, including the covenant for renewal; and subsequently the lease had been renewed, on the expiration of the term, by a new lease for twenty-one years, containing similar covenants, and the lessee had expended money on the premises, and the value of the property had been much increased, and the covenants in the renewed lease to repair and to insure had been broken; and at the end of the renewed term the landlord, on account of the breach of the covenants, refused again to renew, and brought an action of ejectment. The Lord Chancellor held, affirming a decision of Vice-Chancellor Sir W. P. Wood, that a Court of Equity would not compel the landlord to renew, nor restrain him from ejecting the lessee (1); and it was also held, affirming the decision of the Vice-Chancellor, that the construction of the covenant for renewal in the first lease was not, that in future leases the renewal was to be on request only, whether the lessee's covenants had been performed or not, because it provided that the renewed lease should contain a like covenant for renewal; and that the condition precedent to a renewal was twofold—request in writing, and compliance with the covenants—and that the double condition was not confined to the first renewal, but applied *toties quoties*, that the Court would not interfere by injunction to prevent the lessor recovering possession in ejectment, the lessee not having, within reasonable time, proceeded to repair; and that there is no sound distinction between the principles as to relieving against forfeiture in cases of a covenant for perpetual renewal and ordinary cases; but as the case was one of great hardship on the lessee, and the question had not before arisen in the case of a lease with a covenant for a perpetual renewal, the Court dismissed the bill without costs (2).

31. Where lands had been devised in trust for A. for life, with remainder to children, with power to the trustee to sell and give a discharge to the purchaser; and in 1807, T., who was wrongly supposed to be the trustee, sold the lands, and gave a receipt to the purchaser; and the purchase-money had been paid, with T.'s consent, to the tenant for life, who appropriated it; and the interests of the remaindermen accrued in 1845, and in 1851 they filed their bill to set aside the sale; the Master of the Rolls, Sir J. Romilly,

(1) *Job v. Bannister*, 2 K. & J. 374; 3 Jur. (N. S.) 93.

(2) *Ib.*

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held, that the sale being *bonâ fide* and for value, and the purchaser being discharged from seeing to the application of the purchase-money, the Court would not grant relief, it appearing that T.'s estate was sufficient to make good any liability that might be established in respect of the sale; and a perpetual injunction was, under the circumstances, granted to restrain the remaindermen from proceeding at Law to recover the estate (1).

32. Where, by a lease empowering the lessee to build, the lessee covenanted to cultivate the part of the demised land on which no buildings should be erected in a husbandlike manner, and there was a clause of forfeiture for breach of covenant, and the lessee built a vitriol factory on the land with the knowledge of the lessor, but, being obliged to discontinue the manufacture by an indictment, he pulled down the manufactory, and paid part of the proceeds of the building materials to the lessor in pursuance of an agreement between them; upon appeal it was held, reversing the decision of the Court below, that the lessor had not in Equity precluded himself from entering for the non-cultivation of the land after the manufactory was pulled down, and an injunction to restrain execution in an action of ejectment was dissolved (2).

33. Where the plaintiff in the suit, having been advised that his daughter, then an infant, was entitled in fee to two fourth parts of certain freehold estates, then vested in trustees, subject only to a question whether he, the plaintiff, was or not entitled to the rents thereof for his life, as tenant by the curtesy, had instituted, in 1826, a suit, to which he was not a party, but in which he was named, and acted as next friend of his infant daughter, and in 1830 had obtained a decree in such suit, inconsistent with any title in himself as tenant by the curtesy, declaring his daughter to have become entitled, at the death of her mother, "to two-fourths of the estate in fee, and to the rents and profits thereof," and directing a partition and an allotment of two-fourths of the estates to the daughter; and in 1833, the father, still acting as next friend of his daughter in the suit, had obtained an order of the Court approving of a deed of partition, containing a conveyance by

(1) *Hope v. Liddell*, *Liddell v. Norton*, 21 Beav. 183; 2 Jur. (N. S.) 105; 25 L. J. (Ch.) 90.

(2) *Hills v. Rowland*, 4 De G. M. & G. 430.

the trustees of two-fourths of the estate in question to the daughter in fee, and declaring that the father, his executors, &c., should have the use of the same for ten years, if the daughter should so long live, and remain an infant and unmarried; and from and after the happening of either of those events to the daughter in fee; and providing that the rents received by the father should be applied, at the discretion of the father, towards the maintenance of the daughter; and this the father accordingly did until the daughter attained her majority in 1843, after which, until her marriage in 1847, without her father's consent, he duly accounted to her for the rents of the estates; and after the marriage the daughter and her husband brought ejectment against the father, who thereupon, in 1852, obtained, according to the then practice, the common injunction, claiming by the same bill to be entitled, as tenant by the curtesy, to the rents of the estates in question, on the ground that his title was not concluded by the suit commenced in 1826, to which he was not a party, but which he alleged had been instituted and conducted by him as next friend of his daughter in ignorance of his own right to curtesy; the Lords Justices held, dismissing with costs an appeal from the decision of Vice-Chancellor Sir J. Stuart declaring the plaintiff not entitled to curtesy, that the proceedings and conduct of the plaintiff from the commencement of the suit in 1826 were tantamount to a waiver, as against his daughter and her husband, of his right to curtesy out of the estates in question; and moreover, that the representations shewn in evidence to have been made by him to his daughter were such as that the marriage must be considered as having been contracted by her upon the faith of the correctness of those representations, and the plaintiff considered as liable to have that faith treated as the legitimate consequence of such representations (1).

Proceedings
(here) tanta-
mount to
waiver of
curtesy.

34. Where, in 1779, copyhold land, held of the manor of T., had been demised for a term of sixty-five years, and the lessee obtained from the lord at the same time a grant of part of the waste of the same manor, and afterwards made a private canal, with the consent of the reversioner of the copyholds, through both the copyhold and waste land; and in 1794 an Act of Parliament was passed authorizing the company to make the S. canal, of

(1) *Stone v. Godfrey*, 18 Jur. 524.

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which the private canal was to form a part, and for this purpose it was to be widened and improved under conditions; and in 1797 the canal was opened for traffic; but no agreement was ever come to for the purchase of the interest of the owner of the reversion of the copyholds; and upon the expiration of the lease in 1844 an action of ejectment had been brought by certain parties claiming this reversion, and judgment had been given for the plaintiffs in the action; and a bill was thereupon filed by the lord of the manor, who was, under the Act, entitled to that portion of the canal which ran through the above manor, to restrain execution in the action, and to compel the defendants in Equity to execute proper conveyances to the plaintiff, on the payment of what, if anything, was due to them for compensation, and also to restrain the defendants from interfering with the use of the canal; the Master of the Rolls held, that the defendants were not, under the special circumstances of the case, entitled to obtain possession of the land covered by the canal, or to interrupt or interfere with its use, but that they were entitled to receive fair and reasonable compensation for their reversionary interest, and that the amount of such compensation was to be ascertained by reference to the value of the land when the reversion fell into possession, without regard to its being required for the purposes of the canal; and that the Court would itself ascertain and fix the amount of compensation, without referring the matter to another tribunal, and that the amount of compensation was to bear interest at £4 per cent. from the time when the reversion fell into possession; but both parties having claimed more than they were entitled to, they were ordered to bear their own costs of the suit, the plaintiff being also ordered to pay the costs of the Attorney-General, and also the costs of the action at Law (1).

No specific performance of an agreement to grant a lease, where had one been executed lessor would have had a right to determine it for breach of covenant.

35. Where A., in 1814, had agreed for a lease of building-ground for seventy-five years, at a ground-rent, containing the usual building covenants to insure, repair, allow lessor to enter and view repairs, &c., and that in case of non-payment of rent, or breach of any covenant, the lessor was to have the right to re-enter; but the lease was never executed, and the tenant entered and built at considerable expense, and continued in possession up to

(1) *Beaufort (Duke of) v. Patrick*, 17 Jur. 682; *vide* S. C. p. 946, *ante*.

his decease in 1843, and up to that time the rent was paid regularly, but the covenants to repair and insure were neglected; and upon the decease of the lessee disputes arose in the Ecclesiastical Court as to the right to representation to his estate, and probate was not granted until 1847, and during these four years the rent was in arrear, and the covenants to insure and repair were totally neglected, and the lessor threatened to bring ejectment; and a bill was filed to restrain the ejectment, and to have a specific performance of the agreement of 1814; the Court held, that, inasmuch as the lessor, if the lease had been formally executed in 1814, would now have had a right to determine it for breach of covenant, it would not decree a specific performance of it; and that the disputes in the Ecclesiastical Court as to the right of succession to the lessee did not afford sufficient grounds for relief (1).

36. In *Moses v. Lewis* (2) the Court refused a special injunction (*i.e.* upon affidavit) to restrain execution upon a judgment in ejectment obtained by one of two defendants against the other defendant, where the plaintiff, as landlord, might have made himself defendant at Law to the action of ejectment brought against his tenant.

The Court will not restrain execution in ejectment, where plaintiff in Equity might, as landlord, have made himself defendant at Law.

37. Where there had been two verdicts in favour of the plaintiff on trials of ejectment, the Court granted a perpetual injunction (3). And after two trials at bar by direction of the Court of Chancery, and both verdicts the same way, Equity will grant a perpetual injunction and decree upon the right found by the verdicts (4). Though in *Bath (Lord) v. Sherwin* (5) Lord Chancellor Cowper, on the ground that the title was purely legal, refused a perpetual injunction, though the plaintiff had had five verdicts in ejectment at Law, there being no ingredient of trust, fraud, accident, &c., in the cause, as giving the Court jurisdiction; yet upon an appeal to the House of Lords, at the recommendation of the Lord Chancellor, a perpetual injunction was decreed (6). So in *Barefoot v. Fry* (7) a perpetual injunction was decreed where the defendant had brought five ejectments, and had been nonsuited upon

The Court will grant a perpetual injunction to restrain ejectment after two verdicts in favour of the plaintiff, and, in purely legal titles, has decreed a perpetual injunction after five verdicts—and after three nonsuits and two verdicts.

(1) *Gregory v. Wilson*, 9 Hare, 683.

(2) Jac. 502.

(3) *Leighton v. Leighton*, 1 Str. 404.

(6) 4 Bro. P. C. 373.

(4) *Leighton v. Leighton*, 4 Bro. P. C. 378.

(5) Prec. Ch. 261; Gilb. Eq. Rep. 2.

(7) Bun. 158.

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full evidence in three of them, and had verdicts against him in the other two. In case of a trust estate devised to be sold, or devised to S., if the will be disputed, after two trials in favour of the will, Equity will grant a perpetual injunction (1).

38. Where on a bill for specific performance of a parol agreement to grant a farm lease, with the usual covenants of the neighbourhood, an injunction to prevent ejectment had been obtained, the plaintiff having taken possession; upon answer, stating the insolvency of plaintiff, and various breaches of the agreement during five years' possession, the injunction was continued on an undertaking to give judgment in ejectment, go to the commission, and set down the cause for the then next term, paying rent into Court; and the defendant also having insisted on a covenant not to assign, that was held to be a subject of inquiry as to the custom of the neighbourhood (2).

39. Where an *ex parte* injunction had been obtained to stay an ejectment, to which the plaintiffs in Equity stated in their bill they had no defence at Law, and there was not sufficient time for the defendants to move to dissolve it before the day of trial, and it appeared afterwards that the injunction had improperly issued, but without any misrepresentation as to the facts in the plaintiffs' affidavits; the Court dissolved the injunction with costs, but held, reversing an order of the Court below, that the Court had no power, on motion by the defendant, to order the plaintiffs to give judgment in the ejectment (3).

40. Where, by his bill, the plaintiff prayed generally for an injunction to restrain the defendant from proceeding in an ejectment at Law, and upon the motion for an injunction the defendant's counsel stated that the defendant intended to rely at Law upon forfeitures against which a Court of Equity cannot grant relief, and the plaintiffs' counsel then sought to confine the injunction to those forfeitures against which Equity will relieve; the injunction was refused, except upon the usual terms of confessing judgment at Law, because the case at Law was upon the eve of trial, and the plaintiff had suffered a considerable time to elapse

(1) *Leighton v. Leighton*, 1 P. Wms. 671.

(2) *Boardman v. Mostyn*, 6 Ves. 467.

(3) *Brown v. Newall*, 2 My. & Cr. 558.

before he filed his bill, and he had not required a particular of the forfeiture upon which the defendant intended to rely at Law, and even if the limited injunction were granted the defendant would still be obliged to have a trial at Law (1).

41. The Court refused with costs a motion by a remote remainderman and tenants of the estate, to restrain a receiver from ejecting the tenants, their interest (*i.e.* the interest of the remote remainderman and tenants) not being sufficient. A receiver is to let the estate to the best advantage, but he cannot raise the rents upon slight grounds, nor turn out tenants, nor let even for one year, without application (under the old practice) to the Master (2).

The Court refused on the motion of a remote remainderman and tenants to restrain a receiver from ejecting the tenants.

42. A party who had suffered a decree which debarred his right to the estate to be inrolled, &c., was stayed by a perpetual injunction from bringing an ejectment till the decree should be reversed (3).

A party who suffers a decree debarring his estate to be inrolled, will be restrained by perpetual injunction from bringing ejectment till the decree is reversed.

43. Where, by settlement of December, 1786, A. was made tenant for life, with remainder to J. for life, with remainder to the first and other sons of J. in tail male, with remainder to J. in fee; and A. and J. were empowered to make leases of the settled estates, and by lease of the 1st of February, 1787, A. and J. demised part of the settled estate to G., and covenanted for the quiet enjoyment of the lessee and her heirs against the acts of the lessors, or the acts of any person claiming under them, but this lease was not warranted by the power; and on the 26th of January, 1819, a settlement was executed on the marriage of F., the eldest son of J., whereby J. and F. joined in resettling the estate, and thereby a present provision out of the lands was made for F. during the life of J., and the estates were charged with sums of money for portions for the younger children of J., and for his own benefit, subject to which they were limited in the usual course of family settlements; and J. and F. covenanted that the lands were free from incumbrances, "such leases of the premises as have been heretofore really and *bonâ fide* made, only excepted," and J. having died F. brought an ejectment to recover possession of the lands

(1) *Horne v. Thompson*, Sau. & Sc. 615. (2) *Wynne v. Lord Newborough*, 1 Ves. J. 164, 165.

(3) *Selby v. Selby*, Dick. 678.

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demised by the lease of 1787, and obtained judgment; whereupon the persons interested in that lease filed a bill for an injunction, and to compel F. to confirm it, insisting that by the settlement of 1819 he had agreed to ratify and confirm the lease; a Court of Equity decreed accordingly (1).

44. Where a woman seised of copyholds had executed a surrender jointly with her husband to such uses as her husband should appoint, and in default of appointment to him in fee, but no admittance was entered under the surrender, and the husband then executed a conveyance of the copyholds to a purchaser, but still no admittance was entered; and the plaintiff, who claimed under the purchaser, filed a bill in Equity to restrain an action of ejectment by the copyhold heir of the wife, and to compel a surrender to complete his title; the Court held, that the husband of the copyholder had no power to make perfect that title which he as a volunteer, and without consideration, took imperfectly; and no person claiming under him could ask that his defective title should be made complete; and the bill was dismissed with costs (2).

45. After leave given to bring an ejectment, a new ejectment cannot be brought without the leave of the Court (3).

46. Where A., tenant in tail, with power to lease, remainder to B., the wife of C., made leases exceeding his powers; and by will devised some benefits to B., but B. elected to take her estate tail in opposition to the will; and after her death C. claimed as tenant by the curtesy, though he also derived and accepted benefits under the testator's will; and C. brought ejectment against the lessees; the Court held that the lessees could not raise any equity against C., holding as tenant of the curtesy, under B.'s election of her estate tail; but their bill was retained that they might have satisfaction from the testator's assets (4).

47. In *Lutwyche v. Southin* (5), a fine levied *pendente lite* was not allowed to be set up at a trial of ejectment.

A bill to stay
an ejectment,

48. Where a bill, praying for an injunction to stay an ejectment,

(1) *Gray v. Knox*, 5 Ir. Eq. Rep. 465.

(2) *Sowerby v. Gutteridge*, 18 L. J. (N. S.) Ch. 9.

(3) *Sands v. Sands*, 1 Ves. Sen. 495.

(4) *Darlington (Earl) v. Pulteney*, 2 Ves. J. 544; 3 Ves. J. 384.

(5) *Dick*. 286.

stated that the plaintiffs in Equity had no defence at Law, and the bill was supported by an affidavit which contained the same statement, the Court granted an *ex parte* injunction upon the bill and affidavit (1). But the bill must allege facts which raise an equity, which will entitle the plaintiff to an injunction; the statement of a legal inference, not supported by the facts, is not enough (2). A bill to restrain an action (here upon a note), which shews upon its statements that the plaintiff has capacity to defend the action, is demurrable (3).

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should allege facts raising an equity entitling to an injunction.

49. The Court, in Ireland, will not restrain a plaintiff in an ejectment for non-payment of rent from executing his *habere*, where the bill is filed after judgment in the ejectment (4).

50. A. P. and C. P. being seised in fee, as co-heiresses, of the lands of C. and other lands, A. P., on her marriage with Sir H. C., by indenture of 1730, settled her moiety on Sir H. C. for life, with remainder to his first and other sons in tail male; and thereby Sir H. C. and A. his wife were empowered to demise, or join with the owner of the other moiety in demising, the settled land for three lives, or any number of years determinable on three lives. In 1732, Sir H. C. and A. his wife, and C. P., demised to H. B. and his heirs the lands of B., for three lives, renewable for ever, and covenanted to warrant and defend the premises to H. B. and his heirs, freed from all former gifts, grants, uses, entails, and other charges whatever by them theretofore made. In 1757, on the marriage of H. C., the son of Sir H. C., a partition by writ was made between Sir H. C. and C. P., and the lands of B. were allotted to Sir H. C., subject to the lease to A. B., and were, with the consent of H. C., conveyed by C. P. to Sir H. C., subject to the lease. Afterwards Sir H. C. and his son suffered a recovery of the lands, and by deed of August, 1775, settled them to the use of Sir H. C. for life, remainder to H. C. for life, remainder to his first and other sons in tail male. Sir H. C. died, having by his will devised and bequeathed all his unsettled real and personal property to his son H. C., whom he appointed as his executor. C. P. also died, leaving H. C. her heir-at-law, and as such he became entitled to considerable real

(1) *Brown v. Newall*, 2 My. & Cr. 558.

(3) *Davies v. Salisbury*, 14 L. J. (N. S.) (Ch.) 153.

(2) *Ibid.* 558, 569, 576.

(4) *Ivess v. Hunt*, Fl. & K. 408.

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estates belonging to C. P. All the lives in the lease of 1732 having died, H. C. refused to renew it, and brought an ejectment on the title for the recovery of the lands thereby demised. The plaintiff thereupon filed his bill, charging that H. C. having derived a considerable estate in right, and as heir to C. P., was bound to make good her covenants in the lease of 1732, and praying for a renewal of the lease of 1732, or for compensation out of the devised estates of Sir H. C. and of C. P., and for an account of the estates he possessed as heir of C. P., and the Court decreed a renewal (1).

51. In a case in Ireland it was held that if a lease for lives renewable for ever expires without renewal, and the landlord brings ejectment, the tenant ought not to dispute his title, but give consent for judgment and file a bill for renewal (2).

52. Where a lessor in Ireland, being himself a tenant under a lease for lives, renewable for ever, makes a sub-demise, and covenants that every life added by his own landlord shall be also added to the sub-demise, on obtaining a new life in his own lease, he ought to give notice to his tenant that he is ready to renew (3).

53. In a suit in Ireland for renewal, though the defendant be not proved to be the assignee of the reversion, so as to compel him to renew, yet a case may be made for a perpetual injunction to restrain him from executing his *habere* at Law (4).

54. Where, in Ireland, A. being seised of lands under a lease for three lives renewable for ever, demised for the same lives to B. with a covenant for perpetual renewal, and no renewal fine was payable, and therefore the case was not within the Tenantry Act, and the covenant was to renew upon payment of all arrears of rent, within twelve months after the death of any *cestui que vie* nominated in the lease or future renewals; and the lease contained a provision that the lives to be nominated by B. should be the same inserted in the renewals which A. himself should obtain, and a covenant by A. to keep his lease renewed, and give notice to B. within three months of each renewal, to the end that B. might then apply to A. for such renewal at any time within three months after such notice; and that A. would thereupon, upon payment of

(1) *Beere v. Cavendish*, 5 Ir. Eq. Rep. 472. (2) *Wallace v. Patten*, 1 Ir. Eq. Rep. 338.

(3) *Ib.*

(4) *Hamilton v. Patten*, 1 Ir. Eq. Rep. 341.

all arrears of rent, renew to her, provided that if B. did not pay all arrears within twelve months after the death of the nominee for the time being, the covenant should be void; and two of the *cestuis que vie* died in 1799 and 1811, and there was not a year's arrears of rent due after either of their deaths; and A. did not then obtain any renewal to himself, and very large arrears of rent were afterwards suffered to accrue; and in 1828 A. obtained a renewal, and there was then six years' rent due; but all arrears were paid, and a renewal demanded by B.'s representatives within twelve months after that; the Court held the covenant to renew was not forfeited under those circumstances, and that the mere neglect to pay his rent, although gross, would not disentitle the tenant to relief in Equity, and a renewal was accordingly decreed (1).

55. The covenant to pay the rent in the above lease having become useless, and the remedy by distress dangerous, it being impossible to avow generally under the statute for want of a reversion, the landlord brought an ejectment for several years' arrear of rent, to which the tenant took defence, and gave the landlord notice that he relied on the point of law that there was no reversion. The Court held, that relying on this technical defence to defeat the landlord was not such misconduct as would disentitle the tenant to relief in Equity on the covenant for renewal (2).

56. Where an ejectment bill, filed in 1842, stated that the plaintiffs' alleged right to the land accrued in 1812, that a bill had been filed in 1824 to recover the property, and that an ejectment had been brought in 1832, which was stayed until the plaintiff had paid the costs of a former ejectment, but did not state the result of the suit or action; the Court held, that it must be inferred that they had failed, and that they did not prevent the operation of the Statute of Limitations (3).

57. Where a bill in Ireland prayed an injunction to restrain the defendant from proceeding in an ejectment, on the ground that one of the lives upon which the lease depended still existed, it was dismissed, as plaintiffs had not established their title to the lease (4).

(1) *Fitzgerald v. O'Connell*, 6 Ir. Eq. Rep. 455; 1 J. & L. 134.

(2) *Ib.*

(3) *Bampton v. Birchall*, 5 Beav. 67.

(4) *O'Donnell v. Nolan*, 4 D. & War. 115.

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58. Where lessees of a mine admitted the forfeiture of the lease at Law by reason of breaches on their part of covenants which it contained; but upon their alleging and establishing by evidence, that after the breaches the lessor's agent had encouraged them to lay out money on the premises, and upon their also making out that there was in other respects a presumption that at the hearing they might be entitled to equitable relief; the Court, considering that the inconvenience of allowing an ejectment to proceed would far exceed that of stopping the action until the hearing, granted an injunction upon an interlocutory application (1). And, *semble*, where a landlord is aware that a lease is or must be forfeited, and allows the tenant to go on spending money on the property, the landlord will be restrained from availing himself of the forfeiture at Law (2).

Semb., where landlord is aware a lease is, or must be, forfeited, and allows tenant to spend money on the property, landlord will be restrained availing himself of the forfeiture.

SECT. 2. *Possession.*

The Court will not restrain proceedings to recover possession against a plaintiff who, pending a suit

1. Where the plaintiff has by tortious means got into possession of property pending a suit to establish his equitable title to it, the Court will not stay legal proceedings against him for the recovery of possession (3).

If a succession of occupiers of waste land in a colony permit one another to continue in undisturbed possession for fifty years, the representatives of the

2. Where a succession of occupiers has been permitting one another to continue undisturbed in the use of waste land in a colony, and neither has insisted on the exclusive possession for about fifty years, it is no longer in the power of the representatives of the first lawful possessor to bring trespass against the representatives of subsequent trespassers, for acquiescence is a sufficient answer (4).

first lawful possessor has no longer the power to bring trespass, acquiescence is a sufficient answer.

(1) *North Staffordshire Steel, Iron, and Coal Company v. Camoys* (Lord), 12 L. T. (N.S.) 780; 11 Jur. (N. S.) 555.

(2) *Ib.*

(3) *Grafton v. Griffin*, 1 Russ. & My. 336.

(4) *Humphrey v. Nowland*, 6 L. T. (N. S.) 116.

SECT. 3. *Rent.*PART II.
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1. A landlord, against whom his tenant has obtained judgment in an action for excessive distress, is not entitled to an injunction to restrain proceedings upon the judgment on the ground that rent and dilapidation money have subsequently become due from the tenant (1).

A landlord cannot restrain proceedings on a judgment in an action for excessive distress, on the ground that rent and dilapidation money have subsequently become due.

2. Where a sheriff, having in his hands a sum of £35, which he had reserved for rent due to the landlord out of moneys levied out of a *fi. fa.* issued against a tenant of the property in dispute in the cause, over which a receiver had been appointed, moved that an action brought against him by the plaintiff in the cause for the money (the receiver also claiming the rent) might be stayed, on the sheriff paying the £35 into Court; the Master of the Rolls, Lord Langdale, said he was of opinion he could not interfere, and refused the motion (2).

3. Pending an interpleader suit to determine the respective rights of the defendants to the rent of premises occupied by the plaintiff, the Court granted an injunction to restrain legal proceedings for payment of the rent, and ordered it to be paid into Court until further notice (3).

The Court will, pending interpleader to determine the rights of defendants, restrain proceedings for rent.

SECT. 4. *Executions (so far as they relate to Real Property).*

1. Where a party decrees to restrain proceedings at Law upon judgment after an execution has been issued, the amount marked on the writ and the costs at Law must generally be lodged in Court or satisfactorily secured (4).

2. Lands were devised to a trustee and his heirs, to the use of A. for life, without impeachment of waste, with divers remainders over; and a power was given to the trustee, with the consent of the tenant for life in possession, to sell the property, or any part of it, and to lay out the money in the purchase of other lands, to be

- (1) *Maw v. Ulyatt*, 31 L. J. (Ch.) (N. S.) (Ch.) 368.
 33; *vide ante*, p. 653, pl. 5. (3) *Glover v. Reynolds*, 16 L. T. (N. S.) 113.
 (2) *Try v. Try*, 13 Beav. 422; S. C. (N. S.) 113.
sub. nom. *Trye v. Trye*, 20 L. J. (4) *Rogan v. Weir*, Sau. & Sc. 677.

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settled to the same uses, and in the meantime to invest it in the public funds; and for the purposes of such sale to revoke the original uses and appoint new uses. A contract was entered into for the sale of the estate for £13,400, exclusive of the timber, which was to be taken at a valuation; and it being conceived that the tenant for life, without impeachment of waste, was entitled to receive for his own benefit the amount of the valuation of the timber, a deed was executed by which he, in consideration of £2448, conveyed the timber to the purchaser; and the trustees, in consideration of £13,400, conveyed the land, exclusive of the timber. Many years afterwards the tenant for life, being advised that he was not entitled to the amount of the valuation of the timber, transferred to the trustee as much 3 per cent. stock as £2448 would have produced at the time of the sale. After the death of A., the tenant for life, the next remainderman, though he had concurred in proceedings in which the fund produced by the sale was treated as applicable to the purpose of the testator's will, brought a writ of formedon, and obtained judgment on the ground that the power of sale was not well executed; and it was held, that a Court of Equity ought not to interfere by injunction to deprive him of the benefit of that judgment (1).

3. Where a lessor had waived breaches of covenant on the part of his lessee, Lord Lyndhurst would not extend the benefit of the waiver to sub-lessees holding under the lessee, and refused to restrain the lessee from executing a judgment in ejectment against his sub-lessee (2). In this case a building lease had been made from A. to B., and B. underlet to C.; and C. was to build houses, but by his inability to do so, his underlease became forfeited to B., and B.'s lease also became forfeited to A.; and then B. assigned all his interest to D., who applied to A. for an extension of time to complete the original contract, which A. granted; and D. thereupon brought an ejectment against C. for his breach of covenant, and recovered a verdict. The Court refused an injunction to stay execution of the writ of possession. Lord Lyndhurst said: "It is a very vulgar and general notion that it is the province of a Court

(1) *Cockerell v. Cholmeley*, 3 Russ. 1 Cl. & F. 60; 6 Bl. (N.S.) 120; *vide* 565; 1 Russ. & My. 418; Taml. 435; S. C. p. 596, *ante*.

(2) *Illier v. Parkinson*, 9 L. J. (Ch.) 156.

of Equity to step in upon every occasion where the strict rule of Law appears to bear hard upon individuals in particular cases. If it were to be held that Equity is to relieve in any case where the strict rule of Law may press hard upon individuals, it would be nothing more or less than a system of *ex post facto* laws."

4. In *Prior v. Penpraze* (1) the Court overruled a demurrer by a judgment creditor to a bill for an injunction to restrain him from taking out execution on his judgment against an estate sold (before he had obtained judgment), and ineffectually conveyed to a purchaser (the plaintiff), whereby the legal estate descended, since his judgment, to the heir-at-law.

5. Where the principal subject in dispute is the locality of the lands, which have been intermixed and confused while occupied by one person, an ejectment does not decide anything; therefore a Court of Equity will not allow the lessor of the plaintiff to take out his execution, so as to choose his own part of the lands; and where lands are confused, and the plaintiff at Law recovers on an instrument which states the whole to be twenty-five acres, of which eighteen belonged to him, and in fact it appears that the whole land is only twenty-one acres, he shall not be allowed to take out execution for eighteen, but must abate proportionally (2).

6. A Court of Equity will not interfere generally to restrain an ejectment brought against a lessee for breaches of covenant in the lease, except for breach in non-payment of rent (3); and it was held no equitable ground of interference that he had employed persons to make drains, but that they did not do the work properly (4).

A Court of Equity will not interfere generally to restrain ejectment for breaches of covenant, except for breach in non-payment of rent.

7. Where the plaintiff alleged the seisin of his father, for many years before his death, of the premises in fee, and his death and will in 1822, and possession under that will ever since; and that the defendant for the first time raised a claim to the premises in 1855, through two persons, F. and W.; and that the plaintiff could not discover if any person named F. or W. had ever been interested in, or connected with, the premises; and the defendant was proceeding in ejectment, and the plaintiff filed a bill asking

The Court (here) restrained ejectment until a discovery by answer of the character, &c., in which the defendant claimed, and the nature, &c., of his claim.

(1) 4 Price, 99.

(3) *Nokes v. Gibbon*, 3 Drew. 681;

(2) *Hardcastle v. Shafto*, 1 Anstr. 184. *vide* S. C. p. 1100, *post*.

(4) *Ib.*

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a discovery of the character or right in which, and the person through whom, the defendant claimed, and of the nature and particulars of his claim, and how he made out the same: Vice-Chancellor Sir W. P. Wood held, that an injunction ought to be granted until answer (1).

SECT 5. *Lease.*

1. Where the plaintiff was lessee of a coal-mine, at the rent of £300 a year, subject to a royalty of 10s. for every wey of coals raised in each year above 600, that being the quantity considered to be paid for by the £300 a year, and was authorized to determine the lease on the coal being worked out; and the plaintiff having worked the mine for several years, and when it was nearly exhausted being prevented, by accidents and defects in it, from continuing to work it, except at a ruinous expense; the Court nevertheless refused to restrain the defendant from suing for the rent of £300 a year, although the plaintiff offered to pay him 10s. per wey for all the remaining coal (2). Vice-Chancellor Sir L. Shadwell said that in this case there was a fixed sum of £300 a year to be paid, whether the mines were worked or not; and, therefore, that the Court could not relieve the plaintiff from the payment of that sum. The Vice-Chancellor distinguished this case from *Smith v. Morris* (3). He said that this case was materially different from the case of *Smith v. Morris*: for that that case proceeded on this, namely, that, by the terms of the lease, the lessee was bound to work the mine; and, in respect of the produce, a certain royalty was to be paid to the lessor; and it was said that the circumstances of the mine were such that the lessee would be ruined if he were compelled to work it, and, therefore, it was just that he should be relieved from the covenant to work the mine if he gave the landlord all that he could have been entitled to if the mine had been worked according to the covenant, that is, a royalty of 9s. 6d. for every wey of coals contained in the land. In *Smith v. Morris* (4)

(1) *Garle v. Robinson*, 3 Jur. (N. S.) 633.

(2) *Phillips v. Jones*, 9 Sim. 519.

(3) 2 Bro. C. C. 311.

(4) *Supra*.

the plaintiff was lessee of a colliery at a rate of so much per wey; the colliery becoming not worth working, and the plaintiff offering to pay for all the coal that could be got, was relieved against the future rent and the covenant in the lease to work the colliery. The Master of the Rolls said that a Court of Equity must forget its name if it did not interfere in a case so circumstanced; that if any possible disadvantage could arise to the lessor, he would not interfere; that it was true, if parties entered into coal contracts they are bound to fulfil them; but that if parties enter into contracts which are enforced for purposes of harass and vexation, Courts of Equity properly interfere; that the offer to pay the lessor all he could ever obtain, without incurring the expense, was offering him everything he could fairly require.

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SECT. 6. *Forfeitures.*

1. The Court has, under circumstances raising an equity, power to relieve a tenant from the forfeiture of a lease, notwithstanding there is a condition in the lease against assigning or sub-letting. And where A. made a lease of lands, with a condition against assigning or sub-letting without his consent, under his hand and seal, on breach of which the lease was to be void, and the lessee made an agreement for a lease of a part of the lands, with the consent of A. by letter, not under seal; and B. afterwards purchased A.'s reversion, subject to the agreement; and C., the lessee's administratrix, applied to B. for permission to make a lease, in pursuance of the agreement, to E., to whom the interest under it had been assigned; and B. advised and encouraged C. to make the lease, stood by while a large sum was expended by E. on the lands, and witnessed the execution of the lease, knowing it to be a lease of the lands from C. to E.; and B. also knew of the clause against sub-letting, but did not know that the consent of A. was not valid in law, not being under seal, and swore that he had no intention at the time of taking advantage of a forfeiture; upon B. afterwards bringing an ejectment for the forfeiture, the Court restrained the action (1).

The Court has, under circumstances raising an equity, power to relieve against forfeiture of a lease, for a breach of a condition against assigning, &c., without license.

(1) *Burke v. Prior*, 15 Ir. Ch. Rep. 106; *vide ante*, p. 88, pl. 48.

SECT. 7. *Covenants.*PART II.
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1 Where, in January, 1854, A. granted a lease to B., with covenants, and in March, B. mortgaged to C., by an underlease, reserving ten days, and declared himself trustee of the ten days for C., covenanting to perform the covenants in the original lease; and B. did not perform the covenants; and in July C. took possession, and took on himself the performance of the covenants; and in April A. married, and settled his interest in the land subject to the lease; and in March, 1854, B. had, at the instigation of A., assigned all his interest to a trustee for A., and in the same month A. informed C. that he, A., had got all B.'s interest; and in February, 1855, A. sent notice to B. and C. to perform the covenants; and in October, 1855, A. brought ejectment in the names of his trustees against B.; but notice of the ejectment was served on C., and C. let judgment go by default; the Court held, that C. had no equity against the trustees of the freehold, by reason of any liability that A. might have incurred to C. to perform the covenants by putting himself in the place of B. (1)

There is no relief against ejectment for non-payment of rent, if any covenant against which relief does not lie, is broken.

A mortgagee who has contracted to sell a portion of his security for more than the sum due, will not be restrained from enforcing by action the covenant for payment.

The Court will restrain an action against executors for breaches of covenant in testator's lease, after hearing, on further consideration and payment of balances into Court.

2. Where some of the covenants in a lease (other than the covenant to pay rent) were broken, it was held that if any covenant against which relief did not lie was broken, though the rest might not be broken, the Court would not relieve against ejectment for nonpayment of rent (2).

3. The circumstance of a mortgagee, with power of sale, having contracted to sell a portion of his security for a sum exceeding the amount due to him, is not a sufficient ground for restraining him from enforcing by action the covenant for payment (3).

4. If a cause for the administration of assets has been heard on further directions (now further consideration), and the executors have paid their balances into Court, an injunction will be granted to restrain an action against the executors for breaches of covenant in a lease granted to the testator, and the Master (and now the

(1) *Nokes v. Gibbon*, 3 Drew. 681;
vide S. C. p. 1097, *ante*.

(2) *Ib.*

(3) *Willes v. Levett*, 1 De G. & Sm.
392.

Chief Clerk) will be directed to ascertain the damages in respect of the alleged breaches (1).

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5. In *Hannam v. South London Waterworks Company* (2) an action on breach of covenant to repair was restrained under the peculiar circumstances of the case, not amounting to neglect or surprise, and there having been no waiver or abandonment on the part of the defendant.

Action on
breach of
covenant to
repair
restrained
(here).

6. The Court will, upon the ground of vexation by repeated actions for breach of covenant, restrain an action (3).

7. Where a lease for years contained a covenant to pay rent, and a proviso for re-entry on nonpayment of rent, the rent "being first lawfully demanded;" and the property being vacant, the landlord asked for payment of rent from the person liable to pay it, and not receiving it, re-entered; the Court held, that there had been a sufficient demand, and that the lease was effectually determined, and refused an injunction to restrain the landlord (4).

8. Where trustees had brought an action against A. on a covenant executed in ignorance and without consideration, and A., in ignorance of the facts, allowed judgment to go by default, but afterwards, upon his discovering the facts, filed a bill for the delivery up of the deeds to be cancelled; the Court held that A. was entitled to the relief prayed. The trustees had placed money in the hands of their solicitors for investment, and the solicitors, by means of a fraud practised on A., induced him to execute a mortgage of property to the trustees, and handed to them the deeds, but appropriated the money to their own use, and no part of the consideration was paid to A., and the solicitors then became bankrupt; the Court also held that the onus of proving a case of acquiescence was on the mortgagee, and could not be discharged except by proving that the mortgagor was aware of the time and manner in which the mortgagee's money was deposited with the solicitors, and of the fact that no part of it had been applied for the use and benefit of the mortgagor (5).

The Court
will relieve a
mortgagor
from an action
upon a cove-
nant executed
in ignorance
and without
consideration.

9. Where a lessee of a factory, under a covenant with his lessor

(1) *Sutton v. Mashiter*, 2 Sim. 513.

(2) 2 Mer. 65.

(4) *Manser v. Dix*, 8 De G. M. & G. 703.

(3) *Waters v. Taylor*, 2 V. & B. 302; *vide* S. C. p. 83, *ante*.

(5) *Wall v. Cockrell*, 9 Jur. (N. S.) 447.

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to keep the premises insured in the Alliance, or such other office as the lessors should appoint, executed an underlease to the plaintiffs, whereby the plaintiffs covenanted to pay any sum or sums of money expended in fire insurance; and in the erroneous belief that the premises (which were empty) were used for a hazardous trade, he, the sub-lessor, insured the premises at an exorbitant premium, namely £26 5s. per cent., in an office not appointed by the lessors, and sought to recover the amount of the premium at Law against the assignees of his sub-lessees; the Court restrained the action upon the plaintiffs undertaking to pay the amount of premium which was found to be properly payable, and made the defendants pay the costs of the suit, except those arising from an incorrect allegation in the bill that the lessee was agent of the company in which he had insured the premises (1).

10. Where in January, 1857, the defendant had agreed with D. that as soon as he had erected thirty-seven houses, in eight blocks, on certain land, he would grant him eight leases of the land and houses, and the leases were to contain covenants to insure against fire in the Law Life Insurance Office, in the joint names of the defendant and D., or his assigns; and if D. failed to erect the houses within the time specified the defendant was to have the power of re-entry; and in April, 1858, the number of the houses was, by agreement between the parties, altered; and as to seventeen, D. was to roof them in by the 24th of June, and complete them by the 29th of September; and the defendant agreed to grant to D., or his nominee, a lease for four carcasses of houses standing on block No. 1, and also as soon as D., or his assigns, should have erected and roofed in any of the carcasses of the houses in any of the blocks, to grant a lease of the block to D., or his nominee, in the same manner as if the houses were finished; and at that time there were, in addition to the four carcasses on block No. 1, three standing on block No. 4, and D. gave the name of the plaintiff as his nominee, and the defendant agreed, as soon as D. would be entitled to require the same, to grant leases of the seven houses to the plaintiff; and D. assigned to the plaintiff the two plots of land Nos. 1 and 4, and all the benefit of the agreements of January, 1857, and April, 1858, in relation thereto; and the

(1) *Leather Cloth Company v. Bressey*, 3 Giff. 474.

seven houses on the two blocks were completed within the time specified, but none of the remaining houses were erected; and on the 23rd of September, 1858, the plaintiff insured the premises in the Phoenix Office, and in his own name only, and the defendant discovered the latter circumstance, as the plaintiff alleged, two days afterwards, but, as the defendant himself alleged, not till the 1st of December; and the defendant's solicitor, in January, 1859, wrote to the plaintiff's solicitor claiming a forfeiture; and on the 2nd of February the seven houses were insured in the Law Fire Office, in the names of the plaintiff and the defendant; but on the 10th of March the defendant commenced an ejectment for the forfeiture, and he asserted his right to re-enter upon any part of the property for breach of the covenant to build the thirty-seven houses, and of the covenant to insure; and the plaintiff thereupon filed a bill for an injunction, and for specific performance of the agreement to grant a lease. Vice-Chancellor Sir J. Stuart held, that, as between the plaintiff and the defendant, the agreement related only to the seven houses, and that the plaintiff was bound by the stipulations of D. only so far as they related to the seven houses; and a decree was made in the terms of the prayer (1).

11. A Court of Equity will not interfere to modify a strict contract to insure against fire by a lessee, where, by breach of it, the lessor may enter, it being for the interest of all parties that a sacred regard should be had to the strict obligations of the contract (2). But where leases which had been made by the defendant, containing strict covenants by the lessee to insure in a particular manner, were dealt with by the lessor (the defendant) and the lessee, and representations, alleged to be false, were made by the defendant to stay an action on bills brought against him by, and to obtain further sums of money from, the plaintiff before any insurance was effected by the lessee, and the lessor subsequently brought ejectment against the plaintiff (the assignee of the leases) to recover possession of the property, on the ground that the covenants had been broken in several respects: Vice-Chancellor Sir J. Stuart, on motion for a decree for that purpose, granted a perpetual injunction to restrain the action, but without prejudice to the defendant's right to sue in respect of any further breaches of the covenant (3).

A Court of Equity will not interfere to modify a strict contract to insure against fire by a lessee; but an injunction to restrain an action was granted (here) as to past breaches.

(1) *Rogers v. Tudor*, 6 Jur. (N. S.) 692; *vide* S. C. p. 87, *ante*.

(2) *Meek v. Carter*, 4 Jur. (N. S.) 992.

(3) *Ib*.

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12. Where coal mines had been demised at a certain royalty per ton upon the coal which might be got, and also at the rent of £300 a year, or so much thereof as with the royalty should amount to that sum, such rent of £300 to be a minimum rent for the coal demised, and the lessee had covenanted to pay the rent and to work the mine; Vice-Chancellor Sir W. P. Wood held, that a Court of Equity would not restrain an action by the lessor for the minimum rent, although the coal proved to be not worth the expense of working, but that if the lessor were to sue upon the lessee's covenant to work the mine, the Court would interfere; and in applying the rule of *caveat emptor* to the case of lessees of coal mines, it must be remembered that every one acquainted with that kind of property is aware that coal mines are liable to be interrupted by faults; but if all the coal had been gotten by ancient workings, that might have been a case for equitable relief (1).

13. Where A., upon contracting to sell a portion of his land to B., took a covenant from B. that he would not build upon the lands contracted to be purchased, except upon a specified plan; and A., on his part, covenanted for himself and his assigns that he would not build upon the adjacent land remaining in him, except according to the same plan; and the agreement contained a stipulation that £100 should be recoverable as liquidated damages if either of the parties to the agreement at different times should commit a breach of its various stipulations, or any one or more of them; and A. then conveyed the adjacent land remaining in him by way of sale to C., taking from him by the deed of conveyance, which recited the previous contract for sale to B., a covenant that, if he should build on the land comprised in the conveyance to him, he would observe the plan stipulated for in the recited contract, and A. afterwards completed the contract with B. by executing to him a deed of conveyance, with covenants and stipulations in conformity with the terms of the agreement; and after divers mesne assignments the benefit of B.'s contract and conveyance became vested in the plaintiff, and that of C.'s conveyance in the defendants; Lords Justices Knight Bruce and Turner (affirming a decision of Vice-Chancellor Wood) held, that the subsequent owner of the unsold part claiming through the grantor by means of deeds, one of which referred to the deed containing the prohibitory clause,

(1) *Ridgway v. Sneyd*, 1 Kay, 627.

but not to that clause, was bound, in Equity, by the prohibition ; and that the circumstance of the grantor not having performed a covenant to obtain for the grantee a direct covenant from the former purchaser, did not constitute a defence, it not appearing that any application had been made to the grantor for that purpose ; and that notice of a right to prevent building, and of an intention to enforce it, given before any expense was incurred, followed by a bill for an injunction, though not filed till four months afterwards, was sufficient to exclude a defence on the ground of *laches*, it appearing that the plaintiff could not sooner establish his right to enforce the prohibition ; and that the clause as to liquidated damages did not exclude the interference of the Court by interlocutory injunction ; and that the defendants were bound by A.'s covenant as to building on a particular plan contained in his contract with B. ; and they were restrained from infringing that covenant by building on the land, their title to which was derived under the conveyance by A. to C. upon a plan different from that stipulated for by the covenant ; for that, whether the covenants run with the land or not, as the defendant had notice of them, the plaintiff might have an injunction to restrain the defendants from building in a manner contrary to the general scheme for the benefit of all the original parties (1).

Whether covenants run with the land or not, a purchaser with notice will be restrained violating them.

14. Where, in a suit by A. against B. and C., a conveyance of an estate by A. to B. was declared void and set aside for fraud, except as to an intermediate mortgage of the estate made by B. to D. to secure a sum of money lent by D. to B., and for which C. had joined B. as his surety in a bond and covenant to D. ; and the decree also directed B. to redeem the estate and procure its re-conveyance to A., and if he did not do so, gave A. the right to redeem and to use the name of B. for that purpose, and to recover from B. the money which A. should pay to D. for such re-conveyance ; and the bill was dismissed against C. ; and A. afterwards procured an assignment of D.'s mortgage to a trustee, and, in the name of the mortgagees, brought an action against C. on his covenant and bond ; the Court held, that if A. had redeemed D. the debt would have gone as against C. ; that C., as the surety of B., would, on payment of the mortgage debt, be entitled to the benefit

(1) *Coles v. Sims*, 5 De G. M. & G. 1 ; 1 Kay, 56.

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of the security held by D., such security not having been disturbed by the decree; that the charge of participation by C. in the fraud, whereby B. had been enabled to create the mortgage on the estate, was not a ground for depriving C. of such right, and that C. was, therefore, in a suit for an injunction to restrain A. from suing him on the bond and covenant, entitled to such relief (1); and the circumstance of the dismissal as against C. of the bill brought by A. against B. and C., which prayed that the mortgage debt might be paid by B. and C., was material to the case, though it was not alone conclusive, as it might well be, that there might be no equity to compel C. to pay the debt, though C. might have no equity to be relieved from his legal liability to pay it (2).

Ejectment for breach of covenant not to build without consent, restrained (here) on a balance of convenience and inconvenience.

15. Where a lease contained a covenant that the lessee should not, during the term, erect any new building or erection on the premises demised without first obtaining the consent in writing of the lessor, and the lessee had erected in the kitchen garden belonging to the premises a greenhouse or conservatory without the consent of the lessor, and the lessor brought ejectment for the breach of the covenant; on a motion to restrain him from proceeding with his action, Vice-Chancellor Sir W. P. Wood held, that on a balance of convenience and inconvenience, having regard also to the fact deposed to, that the greenhouse or conservatory might be removed in the course of a day, the plaintiff was entitled to an injunction to restrain the action (3).

SECT. 8. *Nuisance.*

A party allowing and acquiescing in the erection of a nuisance will be stayed in his action at Law; but acquiescence while no perceptible injury is sustained does not disentitle to legal remedy for extension of works and injury therefrom.

1. Though where a party allows and acquiesces in the erection of a nuisance, he will be stayed in his action at Law (4); yet if works likely to become a nuisance are erected, and subsequently carried on without any objection, the owners of adjoining estates, who acquiesced so long as no perceptible injury was sustained, are not precluded, when injury arises, from objecting to an extension

(1) *Yonge v. Reynell*, 9 Hare, 809.

(3) *Haigh v. Waterman*, 16 L. T.

(2) *Ib.*

(N. S.) 375.

(4) *Anon.* 2 Eq. Abr. 522.

of the works, or from pursuing their legal remedy to recover damages for injury sustained by such works; and when an action has been brought, and damages recovered, a Court of Equity will not restrain the execution to obtain payment of the amount, or prevent the plaintiff in the action from taking other proceedings at Law (1).

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SECT. 9. *Waste.*

1. In *Cavendish v. Cavendish* (2) the Court granted an injunction to stay judgment wrongfully obtained in an action of waste.¹

2. Though a party may have a legal remedy, the Court of Chancery will, by its inherent jurisdiction to restrain fraud, interfere to prevent waste being committed by a tenant for life in collusion with the owner of the first estate of inheritance, or by a person who unites both these characters in himself (3).

SECT. 10. *Common Lands.*

1. Where A. had applied to the Inclosure Commissioners to inclose common lands, which he claimed as lord of the manor, and B. claimed to be owner of the soil, and it was agreed to adjourn the question in order to obtain evidence; but ultimately the assistant commissioner made a report, and the commissioners made a provisional order, allotting a certain amount of land to A., as lord of the manor; and B. entered a protest of dissatisfaction, and ultimately brought an action on a feigned issue against the commissioners, under the 56th section of the 18 & 19 Vict. c. 118; and A. applied to a Judge in chambers, but he considered that the matter was properly cognizable by the Court sitting *in banco*; and the action being about to be tried, and there being no sittings *in banco*, A. filed a bill to restrain the action, and moved for an

(1) *Bankart v. Houghton*, 5 Jur. (N. S.) 282; *vide* S. C. p. 112, *ante*.

(2) Cary, 76.

(3) *Birch-Wolfe v. Birch*, L. R. 9 Eq. 683; 39 L. J. (Ch.) 345; 18 W. R. 594; 23 L. T. (N. S.) 216; *et*

S. C. p. 176, *ante*. The action for waste, and the other remedies at Law for the injury of waste, have been long superseded by bills in Chancery; *vide* Eden, Inj. 158.

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injunction; the motion was refused, with costs (1). The Vice-Chancellor, Sir R. T. Kindersley, said that the Court which had jurisdiction was clearly the Court of Law, this Court only interfering where there were equitable circumstances which rendered it unjust, as against the defendant at Law, that the action should go on; but here the ground was, that because a Court of Law was miscarrying, or an Act of Parliament absurd, this Court should interfere; that, in any point of view, this Court had no jurisdiction; the only equity, in fact, being that the Common Law Court was not sitting *in banco*; and, moreover, that the intention of the defendant to bring the action must have been known then some time since, and therefore, that an application might have been made to the Court sitting *in banco*.

SECT. 11. *Legal Title and Legal Right.*

Where a previous adjudication in Equity has proceeded, not on the validity of the legal title, but on the absence of a countervailing equity; an action will not be restrained on the ground of the adjudication.

Although the Court will restrain the setting up of an outstanding term to prevent the fair trial of a legal right, yet the Court will not set aside a judgment

1. Where it appeared that a previous adjudication in Equity had proceeded, not on the validity of the legal title, but on the absence of an equity to countervail it, a bill filed to restrain an action, on the ground that the matters in question had already been adjudicated on in Equity, was dismissed (2).

2. Where an action has been actually commenced for the purpose of determining a legal title, the Court of Chancery will not, upon a bill filed after the commencement of such action, seeking relief, the title to which is dependent upon the legal right, assume, as of course, exclusive jurisdiction under the 25 & 26 Vict. c. 42, and restrain the proceedings in the action (3).

3. Although the Court will by decree restrain the setting up of an outstanding term to prevent the fair trial of a legal right; yet, after the trial of an ejectment has taken place, and a term has been set up, whereby the trial of the merits of the case was prevented, and the party using it obtained a verdict and judgment, a suit cannot be sustained to set that judgment aside, nor will the Court set aside a judgment after an ejectment though a term was set up, preventing a fair trial.

(1) *Portsmouth (Earl of) v. Part-ridge*, 8 W. R. 658.

(2) *Waine v. Crocker*, 31 L. J. (Ch.) 285.

(3) *Curlewis v. Carter*, 33 L. J. (Ch.) 370.

fact that the communications made before the trial by the party who so gained the advantage at Law, led the other party to believe that the substantial question of the title would be tried in the ejectment, enable him to sustain a suit for such a purpose; but if there be any impediment to the trial of the legal right in another action of ejectment a suit may be sustained for relief by removing that impediment to the trial of the right in such future action (1).

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But the Court will remove any impediment to the trial of the right in another action of ejectment.

4. Where an action is brought to quiet title, and a decree for the plaintiff enjoins further contesting such title, the defendant may still set up an after-acquired title (2).

SECT. 12. *Annuities.*

1. Where a decree had been made in a suit to redeem an annuity that, in default of payment by the plaintiff, the annuity should be irredeemable, the plaintiff was restrained from proceeding at Law to set aside the annuity deed (3).

2. In *Searle v. Carpenter* (4) the Court granted an injunction to stay proceedings at Law upon an annuity for the life of the plaintiff, upon the plaintiff paying all the arrears into Court; and the Court will stay an action for arrears on a bill by the grantor for an injunction and an account of what is due (5).

SECT. 13. *Mortgages.*

1. Where brewers advanced money to enable a publican to pay the consideration for the purchase of a lease of a public house, and, as soon as the lease to the publican was executed they took a deposit of it, by way of equitable mortgage, accompanied by a memorandum whereby the publican, after reciting the deposit to have been made by himself, stated its purpose, and undertook to

(1) *Master, &c., of Clare Hall v. et vide Roberts v. Maddocks*, 13 Sim. 549; *ante*, p. 182, pl. 6.

(2) *Wetherbee v. Dunn*, 10 Min. 106 (4) Amb. 242.

(Amr.) (5) *King v. Chaplin*, 9 Jur. (N. S.)

(3) *Flight v. Chambre*, 14 Jur. 123; 984.

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execute a legal mortgage by way of underlease when required; and the publican turned out to have been at the time an uncertificated bankrupt; on a bill filed by the brewers, stating it to be the custom for these advances to be made upon the understanding that the lease should, upon its execution, be delivered by the vendor immediately to the brewers, in exchange for the money advanced by them, without either lease or money passing through the hands of the purchaser, and stating that the above transaction was completed in that way, and that the publican was introduced to the brewers by the lessor; the Court restrained an action by the assignees of the publican to recover from the brewers the proceeds of the sale of the lease (1).

The Court will restrain an action by a mortgagee for the difference between the debt and purchase-money of the mortgaged estate, after foreclosure and sale.

2. The Court will grant an injunction to restrain a mortgagee from recovering at Law the difference between the mortgage debt and the purchase money of the sale, after a foreclosure and sale of the mortgaged estates (2).

A mortgagee so dealing with the mortgaged estate as to make it impossible to restore it on full payment, will be restrained suing at Law to recover the mortgage money.

3. If a mortgagee so deal with a mortgaged estate as to render it impossible for him to restore it on full payment, a Court of Equity will prevent him suing at Law to recover the mortgage money. And where a mortgagee had concurred with the transferee of the equity of redemption in selling the property, and had allowed such transferee to receive the purchase money; the Master of the Rolls, Sir J. Romilly, held that the mortgagee could not afterwards sue the mortgagor for the debt, and granted a perpetual injunction to restrain him from doing so, and ordered him to pay the costs of the suit (3).

Where two properties are mortgaged for distinct sums, a surety for one of the properties cannot restrain the mortgagee from proceeding at Law, upon

4. Where two properties are mortgaged by A. to B. for distinct sums, and C. is surety for the one only, the right of B. to retain all the securities until repaid both debts, overrides the right of C. to have the benefit of the securities for that debt for which he is surety; and where one C. had borrowed £5000 of a life assurance company, and this was advanced in two sums, one of £2000 and the other of £3000, and each sum was separately secured upon

(1) *Meux v. Smith*, 1 M. D. & De G. 396; 2 M. D. & De G. 315, 789; 11 Sim. 410; *vide* S. C. p. 562, *ante*.

vide S. C. p. 195, *ante*.

(3) *Palmer v. Hendrie*, 28 Beav. 341; 27 Beav. 349.

(2) *Perry v. Barker*, 8 Ves. 527;

different property, and by different sets of deeds, and F. became surety for payment of the £2000 and interest only; and C. afterwards made default in payment of the £2000 and interest, and the company then sued F. upon his bond to obtain payment of the £2000 and interest, and he offered to pay the sum due on having the securities assigned, but the company, however, refused to give up the deeds securing the £2000; upon a bill by F., as surety, to restrain the proceedings at Law, and asking that the deeds might be delivered to him upon payment of the £2000 and interest, the Master of the Rolls, Sir J. Romilly, held that the company had a right to retain the securities relating to the £2000, and that the property was not redeemable, even by F., without payment of the £3000 for which he was not surety, as well as the £2000 for which he was surety (1).

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offering to pay the sum for which he is surety, the property is not redeemable by the surety unless upon his payment of both sums.

5. A mortgagee cannot effectually, in Equity, without the concurrence of the mortgagor, release a vendor from whom the mortgagor purchased from his covenant for quiet enjoyment. Therefore where A. conveyed to B., with a covenant for quiet enjoyment, and B. conveyed the estate to C. by way of mortgage; and on B. being evicted, A., without the concurrence of B., paid to C. a sum of money in discharge of the covenant, it was held that the transaction was not binding on B.; and A. was, at the suit of B., restrained from setting up the conveyance to C., or the accord between A. and C., as a defence to an action by B. on the covenant (2).

A mortgagee cannot, in Equity, without the concurrence of the mortgagor, release the mortgagor's vendor from his covenant for quiet enjoyment. Mortgagor's vendor restrained (here) setting up the conveyance to the mortgagee, or an accord between the mortgagor's vendor and the mortgagee as a defence to an action on the covenant for quiet enjoyment.

6. The Court will not interfere by injunction to prevent a mortgagee from pursuing his legal remedy to get possession of the mortgaged premises (3). In this case A. mortgaged premises to B. to secure a certain sum, plus the probable amount of costs in preparing the mortgage. The mortgage contained a power of sale upon default of payment at a fixed time. B. entered into a contract to sell to C.; after that B. commenced his action against A. upon the covenant, to recover the amount of his mortgage debt and costs. The action was compromised by D. paying to B. the

The Court will not restrain a mortgagee from pursuing his legal remedy to get possession of the mortgaged premises.

(1) *Farebrother v. Wodehouse*, 23 & G. 293; 17 Jur. 151; *vide* S. C. Beav. 18; 2 Jur. (N. S.) 1178. p. 77, *ante*.

(2) *Thornton v. Court*, 3 De G. M. (3) *Davies v. Williams*, 7 Jur. 663.

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whole amount, minus a very small sum, which A. paid. D. took no regular assignment from B., but merely became equitable mortgagee by transfer of the title deeds. C. then, more than a year after the contract for sale, gave B. notice that he intended to enforce his contract, and thereupon paid his purchase-money, with which, plus a small sum, B. paid off D., and got back the title deeds. B. then brought his action of ejectment against A., who had remained in possession, to enable him to make a conveyance to C. A. then filed his bill against B. and C. to redeem, and for an injunction; but the Court refused to interfere by injunction.

7. Where, default having been made in payment of interest, a mortgagee has recovered judgment for the amount of the principal and interest, and a bill is filed to restrain execution and for specific performance, on the ground that the mortgage deed is not in accordance with the terms of a previous agreement, which provided that the principal should not be called in for a term still unexpired, an injunction will be refused, except on the terms of the amount recovered being paid into Court; since, if a clause in accordance with that provision in the agreement had been inserted in the deed, it would, as a matter of course, have made the not calling in of the principal conditional on the punctual payment of interest. The Vice-Chancellor, Sir J. Bacon, said it seemed to him that the facts appearing in this suit might have been pleaded as an equitable plea to the action; and that though there was great weight in the argument that possibly a Court of Law could not on that plea work the complete justice sought to be obtained by the bill, yet that he was clearly of opinion, that in that case the plaintiff ought at least to have filed his bill earlier, and that no injunction would be granted except on the terms of the plaintiff paying into Court the whole amount which had been recovered on the judgment (1).

SECT. 14. *Vendor and Purchaser—Specific Performance.*

1. Where the description in the printed particular of sale was calculated grossly to deceive as to the real nature and value of the estate sold, the Court refused an injunction to stay proceedings in

(1) *Seaton v. Twyford*, 19 W. R. 200. ,

an action brought by the purchaser to recover the amount of his deposit (1).

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2. In *Fordyce v. Ford* (2) the Court granted an injunction to stay an action against the auctioneer for the deposit, although the estate sold was represented as freehold, with leasehold adjoining, and it turned out to be almost all leasehold. The Master of the Rolls said that an abstract was delivered on the 8th of July, by which it appeared that the estate should rather have been called a leasehold estate with a freehold adjoining, for of the seventy acres, sixty-two were leasehold and only eight freehold; that if the defendant had made that objection he should have thought the purchase ought not to be carried into execution, but that the abstract was delivered on the 8th of July, and no objection of that kind was made, so that the purchaser acquiesced, and that no great delay was attributable to the seller's solicitor; that if he were to grant the injunction it would be to prevent the defendant endeavouring at Law to set the transaction aside; that the rule certainly was, that where, in a contract, either party has been guilty of gross negligence, the Court would not lend its assistance to the completion of the contract; that then the question was, how the rule applied to this case—whether the seller's solicitor had been guilty of any gross negligence or of misrepresentation; that if the purchaser had made the objection as to its being represented as freehold with leasehold adjoining, and turning out leasehold, he should not have thought he ought to be bound, but that he knew it on the 8th of July, and made no such objection; and that, therefore, it became a question whether that ever entered into his intention; that he hoped it would not be gathered from hence that a man was to enter into a contract, and think that he was to have his own time to make out his title; that it was now set up that the defendant wanted this estate for his last summer's residence, and that, consequently, no title being made till September, it was of no use to him; that he thought this was a case where the plaintiff might have a right to compel the performance, and that therefore on bringing the money into Court the injunction must go.

3. Though the vendor retains possession of the estate, the Court will not restrain an action for the deposit, nor compel the vendor

(1) *Stewart v. Alliston*, 1 Mer. 26.

(2) 4 Bro. C. C. 494.

to pay the deposit money into Court, if the delay in the completion of the contract is occasioned by the purchaser (1).

4. In *Buckland v. Hall* (2), an injunction against a landlord who had brought ejectment against the plaintiff, his tenant, after an agreement for renewal of his lease, on the ground of his having become insolvent, was dissolved; the bill also prayed specific performance of the agreement. Lord Chancellor Eldon said: "The Court must take care that the tenant is not rashly turned out of possession; on the other hand it is too hard against the landlord to introduce upon the record an averment that this tenant has some way or other become insolvent. With respect to the insolvency, the weight of that objection is more or less in different cases. There is a distinction certainly between a purchase and a lease. In the former instance the bill for specific performance tenders payment of the purchase-money; the latter is very much otherwise; and the Court ought not to forget the habit of dealing among mankind with regard to the relation of landlord and tenant. Every man taking a tenant looks to the probability of the rent being paid; and that attention is paid to that circumstance through the whole currency of the lease, that introduces a provision not to assign or underlet without license. If the tenant undertakes for nothing but the payment of rent, it must be appreciated accordingly. If, beyond that, he undertakes considerable expenditure upon the premises before he is to be placed in the relation of lessee, that is directly connected, as a most important circumstance, with the fact of solvency or insolvency;" and that, "under all the circumstances of this case, without relying upon any one, the injunction ought not to be sustained, certainly not without considerable terms imposed; such as bringing no writ of error, giving security for the costs of the case, perhaps for the rent and repairs."

5. Where a tenant, holding under an agreement for two years, with the option of purchasing, filed a bill against the landlord for specific performance of the contract of sale, and the landlord afterwards commenced an action of ejectment against the tenant, the Master of the Rolls, Lord Langdale, refused to restrain the action, except upon the terms of the plaintiff undertaking to continue to pay the rent, without prejudice to any question in the cause; but

(1) *Wynne v. Griffith*, 1 S. & S. 147.

(2) 8 Ves. 92, 93.

it was subsequently agreed that in lieu of the undertaking the plaintiff should pay the purchase-money into Court (1).

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6. Where a vendor had proceeded in the treaty beyond the time for completing the contract, and had brought an action, and withdrawn his record on finding he could not support it, not having got in a judgment amounting to half the purchase-money, and the purchaser had brought an action for his deposit and obtained a verdict, an injunction to restrain his proceeding was refused (2).

7. Where conditions for sale of leasehold property expressly made time to be of the essence of the contract, and provided that if from any cause or circumstances whatever the contract was not completed agreeably to the conditions by the time specified, the vendor might annul the contract; and the time fixed for completion was between one and two o'clock on the 11th of October, when the vendor attended and executed the assignment of the property, and the purchaser's agent almost immediately afterwards also executed it; but the purchase-money was not then paid, and the vendor annulled the contract on the afternoon of the same day, namely, the 11th of October, and re-sold the property; the Master of the Rolls held, that he was entitled so to do; and upon a bill filed by him against the purchaser, the Court cancelled the assignment, decreed a reconveyance of the property, and granted an injunction to restrain two actions and gave the plaintiff the costs of the suit (3).

8. Where a lease contained a covenant by the lessee not to assign without license, and a covenant by the lessor not to refuse his license unreasonably or vexatiously; and the lessee contracted to assign his lease to the plaintiff, "subject to the landlord's approval;" and the lessor on being applied to for his license refused to give it, because he wished himself to buy up the lease in order to rebuild the premises; and the lessee having failed to obtain the lessor's license, surrendered the lease to the lessor for the same price for which he had agreed with the plaintiff; on a bill by the plaintiff against the lessor and lessee for specific performance of the contract to assign the lease to him, it was held by Lords Justices Wood and Selwyn (reversing a decision of Vice-Chancellor

Lessee not bound (here) to take legal proceedings to oblige lessor to give his license to assign the lease.

(1) *Pyke v. Northwood*, 1 Beav. 152.

(3) *Hudson v. Temple*, 3 L. T.

(2) *Wood v. Bernal*, 19 Ves. 220.

(N.S.) 495.

Stuart), that the reference to the landlord's approval in the contract did not throw upon the lessee the duty of taking legal proceedings to oblige the lessor to give his license; and that, having used all reasonable efforts to induce the lessor to consent, he was at liberty to consider the contract at an end and make his own terms with the lessor, and the bill was dismissed with costs (1).

9. Where the plaintiff had agreed by parol with W. for a purchase by W., on behalf of the plaintiff, of a life interest of the plaintiff in real estate, upon a sale by a mortgagee of the life interest part of which estate, a cottage, was in his, the plaintiff's, own occupation; and the terms were, that W. should be paid the purchase-money and interest out of the rents of the whole property, and should allow the plaintiff to continue to occupy the cottage; and G. swore that this was the effect of the parol arrangement, but two other witnesses swore that they had heard W. deny it; and a short time after this agreement W. asked the plaintiff to execute an absolute conveyance of the same life interest to W.'s daughter, an infant, which the plaintiff accordingly did, and W. entered into possession of the property, leaving the cottage in the plaintiff's possession, rent free; and W. wrote letters afterwards to G. and to J., saying that he had bought the property out and out, and offered the plaintiff an annuity for life if he would give up possession of the cottage; and W., by will, devised his real estate to his daughter, and appointed B. his executor and her guardian, and B. made the plaintiff an offer of the annuity on the same terms as W. had done, but the offer was refused, and thereupon B., as the next friend of W.'s daughter, brought ejectment against the plaintiff; Lords Justices Knight Bruce and Turner held (affirming a decision of Vice-Chancellor Sir R. T. Kindersley), that evidence of the parol agreement was admissible notwithstanding the Statute of Frauds (29 Car. 2, c. 3), and that the plaintiff was entitled to a decree declaring the daughter of W. to be a trustee for him, and that he was entitled to redeem on payment of what was due, and restrained the action (2).

10. Where a vendor insisted on executing the purchase deed,

(1) *Lehmann v. McArthur*, L. R. 3 Ch. 496; 37 L. J. (Ch.) 625; 16 W. R. 877; 18 L. T. (N. S.) 806. (2) *Lincoln v. Wright*, 28 L. J. (Ch.) 705.

without the purchaser or any agent of the purchaser being present, and also insisted on the purchase-money being paid, not to himself, but to his solicitor or his solicitor's clerk, to neither of whom he had given any written authority to receive it; and on the purchaser declining to complete the purchase in that mode, the vendor brought an action against him for the purchase money; the Court held that the vendor ought to pay all the costs of a suit instituted by the purchaser for the specific performance of the contract, and granted an injunction to stay the proceedings at Law (1).

11. Where the plaintiff had sold two leasehold houses, one to the defendant and another to L., but the conveyance to the defendant contained by mistake a part of the property intended to be sold to L., but which the defendant believed he was purchasing; and upon a bill filed against the defendant by L. he was directed to reconvey to L. that portion which by mistake was included in the assignment to him; and the defendant then brought an action against the plaintiff, the vendor, for damages, made under his covenant against incumbrances; and an equitable plea was put in by the plaintiff, who then filed a bill for an injunction to restrain the action; Vice-Chancellor Sir R. T. Kindersley refused the injunction; the question as between the defendant and the vendor being left open as proper to be decided by a Court of Law; and the defendant at Law also having pleaded an equitable plea, it was impossible to say that a Court of Law might not entertain it (2).

12. Notice by the vendor of an intention to resell is equivalent to a declaration that he would not seek specific performance of a contract; and the Court, though it had granted an interlocutory injunction at the suit of the vendor, refused at the hearing to restrain the purchaser's action for the deposit (3). In this case a purchaser raised valid objections to the title, which the vendor refused to satisfy, and the vendor gave notice that if the purchaser refused to complete within five days he should resell, and charge the purchaser with expenses; and the purchaser thereupon gave

Notice by vendor of an intention to resell is equivalent to a declaration that he would not seek specific performance, and the Court refused to restrain an action for the deposit money.

(1) *Viney v. Chaplin*, 2 De G. & J. 468. (2) *Wild v. Hillas*, 28 L. J. (Ch.) 170; 7 W. R. 82; 32 L. T. 116.

(3) *Royou v. Paul*, 28 L. J. (Ch.) 555.

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the vendor notice that he should bring an action for the deposit, if the requisitions were not complied with in a week; and the action was commenced, and the vendor some time subsequently offered to satisfy the requisitions at the purchaser's expense; upon the purchaser's refusal, a bill was filed by the vendor for a specific performance; but the bill was dismissed with costs, and the Court declared that it could order a return of the deposit notwithstanding the dismissal of the bill, the vendor having given an undertaking to that effect; but it would leave the defendant to decide whether he would go on with the action or not for the costs, and the defendant agreed to receive the deposit.

It is not the course of the Court to permit an action on the same subject matter when it entertains jurisdiction in specific performance. After decree for specific performance against defendant, plaintiff cannot bring an action for damages. Plaintiff coming into Equity for its aid is bound to put under the control of the Court his legal rights. Where the Court grants relief in suits for specific performance, it has jurisdiction over the whole matter, and can deal with any question of damages for breach of agreement.

13. It is not the course of the Court, when it entertains jurisdiction in specific performance, to permit an action at Law to proceed for the same subject matter (1); and after a decree for specific performance has been made against a defendant, the plaintiff cannot proceed by an action at Law on the contract for damages (2). A plaintiff, who comes to a Court of Equity for its aid, is bound to put under the control of the Court his legal rights relating to the subject matter of litigation (3); and therefore, where a party brought a suit for specific performance of an agreement, and after obtaining a decree brought an action to recover damages for injury sustained in consequence of breaches of the agreement, the Lords Justices granted an injunction. And where the Court grants relief in a suit for specific performance, it has jurisdiction over the whole matter, and can therefore deal with any question of damages arising from a breach of the agreement (4).

An offer to sell land to be binding on the person offering, must be accepted within a reasonable time; if the person offering die, become bankrupt, or sell before acceptance, the land is not bound.

14. An offer to sell land, to be binding upon the person making it, must be accepted within a reasonable time; and if the person making the offer die, become bankrupt, or sell, before acceptance of the offer, the land is not bound. And where an iron company, owners of a private railway, being desirous of connecting their line with other railways by means of a branch line, applied to the landowners, and to O. and his mortgagees, for way-leave through their lands; and an offer in writing was made to them in March,

(1) *Beaufort (Duke) v. Glynn*, 3 Sm. & Giff. 213.

(2) *Reynolds v. Nelson*, 6 Madd. 298.

(3) *Prothero v. Phelps*, 2 Jur. (N.S.) 173.

(4) *Ib.*

1843, by O. and his mortgagees of a way-leave through their land by a lease for sixty years, by the payment of triple damages yearly; but there was no express acceptance by the company of the offer; and the iron company assigned all their interest to a railway company, who was to construct the line; and in October, 1843, the proposed line was staked out over the lands of O.; and in July, 1844 (all the other landowners being settled with), the works were commenced, and in 1845 the line was opened for traffic; and in June, 1844, the mortgagees of O., under the power of sale, sold and conveyed the property, including the land on which part of the line was formed, to B., who sold to S.; and from 1844 to 1847 unsuccessful negotiations had been pending between the parties for settling the quantum of the yearly rent; and in 1847 S. brought ejectment against the company, and the company then filed a bill to stay proceedings at Law and for specific performance, alleging acceptance of the offer of March, 1843, by the acts of the company in staking out and making their line in accordance with the offer; and praying that the Court would determine the quantum of rent to be paid; the Lord Chancellor, affirming a decree of Vice-Chancellor Sir John Stuart, held, that the acts of the company did not amount to an acceptance of the offer, so as to make it a contract binding the land, and the bill was dismissed; and, although after the suit had been instituted by the railway company for specific performance, the company had obtained legislative powers to retain possession of the land in question, Vice-Chancellor Sir J. Stuart held, that the cause must be decided as if the Act had not passed (1).

15. In *Annesley v. Muggeridge* (2), an auctioneer, on motion of the vendor, was ordered to pay the deposit money into Court, minus his charges and expenses, and the vendee was restrained by injunction from proceeding in his action against the auctioneer for the deposit, in which action he had obtained a judgment for the whole amount of the deposit.

Auctioneer ordered to pay in the deposit money, and vendee restrained proceeding in an action against the auctioneer for the deposit.

16. Where one of the conditions of sale provided that if the purchaser should raise objections which the vendor was unwilling or unable to remove, the vendor should be at liberty to rescind the

(1) *Meynell v. Surtees*, 1 Jur. (N. S.) 737; *vide* S. C. p. 878, *ante*.

(2) 1 Madd. 593.

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contract, and all objections not taken in writing in ten days were to be considered as waived; Vice-Chancellor Sir L. Shadwell held, that this condition applied only to the first delivery of objections, that it was waived by the vendor's consenting to answer them, and granted an injunction to restrain an action against the vendor to recover the deposit money. But Lord Chancellor Cottenham dissolved the injunction of the Vice-Chancellor. The Lord Chancellor said: "The question is, whether I am to interfere with the purchaser's legal right to recover his deposit. I consider he has a legal right to recover the deposit, which enables him to contest with the vendor with his own money, and to have the interest till the decision of the cause. It would be unjustifiable to deprive the purchaser of the power of getting his deposit." (1)

The Court refused (here) to restrain an action against the auctioneer for the deposit money where there had been delay amounting to abandonment of contract in completion by the vendor.

17. If the purchaser demand his deposit at the day for completing the contract, and the vendor has not delivered his abstract before that time, and also neglects to deliver it until after an action brought for the deposit, it is evidence of the abandonment of the contract by the vendor, who shall not be entitled afterwards to a specific performance; and the Lord Chancellor (Lord Thurlow) considered the conduct of the vendor, by delaying the completion, as evidence of an abandonment of his contract, and refused a motion for an injunction to restrain an action against the auctioneer for the deposit (2).

18. Where there was a decree of the Court for the sale of the testator's estates, for payment of his simple contract creditors, and a lot (4) was sold, and the purchaser objected to the title that there were unsatisfied judgments against the heir-at-law of the testator, upon whom Lot 4 had descended; the Court held, that this was a good objection, the judgment creditors of the heir-at-law not being parties to the suit, and although this Court might, upon the application of the purchaser, restrain the judgment creditors from extending their elegit (3).

The Court will restrain a purchaser who has entered into possession, knowing of

19. A purchaser entering into possession knowing of objections to the abstract, but continuing to negotiate, cannot break off the contract; and an injunction will lie against his proceeding at Law

(1) *Tanner v. Smith*, 10 Sim. 410; (2) *Lloyd v. Collett*, 4 Bro. C. C. 469; 4 Ves. 689, n. (b).
4 Jur. 310.

(3) *Parkinson v. Piper*, 8 Jur. 111.

to recover back the purchase-money; but it would be otherwise, if he had declared off on delivery of the abstract (1). objections and continuing to negotiate, from proceeding to recover back the purchase-money.

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20. Under the old practice the Court would not make absolute a rule *nisi* for dissolving an injunction granted to restrain a purchaser from proceeding at Law to recover part of the purchase-money paid by him in advance, the vendor not being able to make a title, and there being outstanding incumbrances; without the master's report as to sufficiency of title, although objections were fully stated in the defendants' answer (2).

21. Where a copyholder in fee agreed with the lord to enfranchise his copyhold, and took the conveyance from the lord in the name of a trustee, and then devised the same lands to his younger son, who sold to A.; and the heir-at-law of the copyholder recovered in ejectment, (as he might do upon his ancestor's admittance); and A. brought his bill against the heir to be relieved in Equity, and insisted that the estate purchased of the lord was purely an estate in Equity (3), and that the disposition of the fee to the purchaser was a disposition of the whole estate that the copyholder had, either in Law or in Equity; and the Lord Chancellor Nottingham being of that opinion, decreed that the purchaser should hold and enjoy against the heir of the copyholder (4). The heir of a copyholder will be restrained from recovering in ejectment against a purchaser claiming under the ancestor of the heir, who had obtained an enfranchisement by a conveyance to a trustee for himself.

(1) *Ward v. Jeffery*, 4 Price, 294.

(4) *Dancer v. Evett*, 1 Vern. 392;

(2) *Church v. Legeyt*, 1 Price, 301.

et vide Dunn v. Green, 3 P. Wms. 9;

(3) *Smith v. Murrell*, 4 Rep. 25 b,

Parker v. Turner, 1 Vern. 393, 458.

CHAPTER III.¹

PERSONAL PROPERTY.

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SECT. 1. *Choses in Action.*

An assignee
of a chose in
action takes
subject to all
equities

1. A chose in action not being assignable at Law, an assignee thereof takes subject to all equities; therefore, where the purchaser of a debt commenced an action to recover it in the name of the assignor, and the debtor pleaded a parol agreement between him and the assignor by way of set-off, and thereupon the plaintiff at Law filed a bill to obtain equitable relief; the Court held, that his remedy was at Law, and that there was no ground here for the equitable interference of the Court (1). Where debentures under the common seal of a company, incorporated under 7 & 8 Vict. c. 110, had been given to A. in July, 1854, in pursuance of an arrangement made between him and the chairman of the directors, which was a fraud on the company; and these debentures were afterwards bought by B. in the market in the ordinary course of business; and the transfer to B. had been registered in the books of the company, and interest paid to July, 1855, inclusive; but the matter had not been made known to the shareholders till December in that year, when an investigation of the affairs of the company took place, in consequence of which the directors resigned, and the further payment of interest was refused; the Court held, that B., though a purchaser *bonâ fide* for value without notice, yet being only the purchaser of a chose in action not assignable at Law, must take it subject to the equities attaching to it; and that, under the circumstances, neither the registration nor the payment of interest had the effect of a confirmation of B.'s title, and that he ought to be restrained from suing on the debentures (2).

(1) *Rolt v. White*, 31 Beav. 520;
9 Jur. (N. S.) 843.

(2) *Athenæum Life Assurance Society v. Pooley*, 3 De G. & J. 294.

2. Where a note, given for the purchase-money of land, to which the payee has given a bond to make a title to the land, has been assigned to a third party, and a suit instituted upon it, and the payee is unable to make a title, the vendee is entitled to relief in Equity (1).

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Vendee of land who has given a note for the purchase-money, is entitled to be relieved against an action by the assignee of the note, if the payee is unable to make a title.

3. Where a vendee of land had purchased a prior incumbrance, and had set up this new title in an action on the note for the purchase-money brought by his vendor, as shewing a total failure of consideration ; it was held, on a bill in Equity for an injunction against such defence, that the remedy in Equity was more certain and complete than that at Law ; and the grantee was enjoined from setting up his new title as a defence beyond the amount which he had paid for it (2).

SECT. 2. *Policies.*

1. Where, in 1844, S. had assigned moneys to trustees to invest, and after his decease, to hold the funds for such person as he should appoint, and in default for his wife for life, with remainder to their children ; and the trustees were, with the consent of S., to apply all or part of the trust moneys in effecting a policy of insurance on his life, and they were to receive the sum insured upon the trusts of the settlement, and the original trustees effected a policy for £1000 on his life ; and in 1846 A. and B. were appointed trustees of the settlement in the place of the original trustees, and the policy had been assigned to them upon the trusts ; and in 1847 C. and D. were appointed trustees in the place of A. and B. for the purposes for which the original trustees were appointed, and the policy had been assigned to them upon the trusts of the settlement ; and in 1852 L. and B. were appointed trustees in the place of C. and D., and the trust estate was assigned to them upon the subsisting trusts of the settlement ; and S. died in 1860, and the defendant claimed to be paid by the insurance office the proceeds of the policy, on the ground that the defendant in 1848 lent S. £50, and C. and D., the trustees at that time of the settlement,

(1) *Black v. Bowman*, 4 Eng. 501
(Amr.)

(2) *Champlin v. Dotson*, 13 S. & M.
553 (Amr.)

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having no funds out of which to pay the debt, or to pay the premium due, assigned the policy, in consideration of the debt, to the defendant for his own benefit absolutely ; and that he had paid the annual premium afterwards, and notice to the office of the assignment to him was given by the defendant in 1852 ; and S. had bequeathed all the trust property to his son, an infant, and the trustees, L. and B., claimed for his benefit the proceeds of the policy, and alleged that the defendant had full notice of the settlement, and that they had offered to pay him his debt with interest and costs ; and the defendant had commenced an action to recover the proceeds, and thereupon the plaintiff, on behalf of the office, filed a bill praying that the claimants might interplead, and that it might be ascertained to whom the proceeds belonged ; Vice-Chancellor Sir J. Stuart held, that the defendant was entitled to the proceeds of the policy, and that L. and B., the trustees of the settlement, ought not to have raised the question (1).

2. Where, a debt having been secured by a policy of insurance effected on the life of one of the debtors, the debtors, by way of further security, had executed a warrant of attorney to their creditor to enter up judgment for the debt, the defeasance of the warrant providing, that so long as the policy was kept on foot by the debtors judgment should not be entered up, nor execution issued on the warrant ; and by an indenture of even date with the warrant, and executed by the debtors, a similar stipulation was made as to execution on the warrant, with a further provision that on default by the debtors in payment of the premiums within a certain period after they should have become due, the creditor might himself either keep the policy on foot, or effect a new policy in his own name, at the expense of his debtors ; and the debtors having failed to pay the premiums in due time, and the creditor not exercising his right to keep it on foot, the policy had become forfeited ; and four days afterwards the creditor, who was a director of the insurance company, paid up the premium and induced the office to renew the policy ; the Court held, that he was nevertheless entitled to enter up judgment and issue execution on the warrant of attorney, and dismissed a bill by the debtors seeking to restrain him from so doing (2).

(1) *Johnson v. Swire*, 7 Jur. (N. S.) 670. (2) *Winthrop v. Murray*, 8 Hare, 214.

3. Where the A. company, in 1847, had granted an insurance for £3000 on the life of C. D., and afterwards, as a cross-insurance, had insured the life of C. D. for £1000 in the I. and L. company, as an indemnity against the one effected with the A. company; and in 1848 the £3000 policy had been bought by the A. company from the grantee in consideration of an annuity, and cancelled; but the A. company continued to keep up the other until the life dropped in 1850, when C. D. died, and the A. company had brought an action to recover the £1000, and the I. and L. company filed a bill in Chancery to restrain the action, and to have the £1000 policy delivered up, it being alleged that, in consequence of the purchase of the £3000 policy, the £1000 policy had become invalid; Vice-Chancellor Sir J. Stuart held, that this bill was not demurrable (1).

4. Where a loan had been granted by an insurance company upon a bond with sureties, and a policy on the life of the borrower as a collateral security, and the premiums were not paid within the days of grace, but were demanded by the company, who brought actions against the sureties of the bond, and they refused to pay, and pleaded *non est factum* and payment; upon a suit instituted to restrain such actions, and it being contended that the demand by the company after the policy "was actually void" had revived it, the Court held, that such revival was neutralised by the fact of refusal to pay, and the bill was dismissed with costs (2).

5. In *French v. Conelly* (3) a demurrer to a bill for discovery of fraud in a policy of insurance to defend an action at law, and that the policy might be delivered up to be cancelled, was overruled.

6. Where a ship, being insured from London to Carolina, was taken by a Spaniard, and retaken by an English privateer, who carried her into Boston, where, no person appearing to give security, she was condemned and sold, and after the recaptors had their moiety, the residue remained in the Court of Admiralty at Boston, and the defendant brought an action on the policy and recovered, and the plaintiff, by his injunction bill, insisted that the defendant ought to have recovered no more than a moiety of the loss; the Court refused the injunction, for as the defendant had

(1) *India and London Life Assurance Company v. Dalby*, 4 De G. & Sm. 462; 15 Jur. 782.

(2) *Edge v. Duke*, 18 L. J. (N. S.) Ch. 183.

(3) 2 Anstr. 454.

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offered to relinquish the salvage, he was entitled to recover the whole money insured. By 13 Geo. 2, c. 4, s. 18, the recapture of a ship is the revesting of the owners' property, so that it is doubtful whether the Act can operate, when insurances, are made, interest or no interest. But this was an insurance *according as interest shall appear*, therefore salvage must be deducted out of the money recovered by the policy if come to the hands of the insured. But the defendant having offered to relinquish his interest in the salvage, it was decreed that the defendant should assign all his right in the ship, and the benefit of the decree in the Admiralty Court, and thereupon the plaintiff's bill to be dismissed (1).

7. Where pending a contract for sale of a policy of insurance, the person whose life was insured met with an accident, which was proved by medical evidence not to have had effects serious or dangerous to his life, and he was afterwards attacked by a disease of long standing, of which he died, but from which no danger to his life was apprehended until after the contract was completed; and the vendee was aware both of the accident and the illness, but did not communicate either to the vendor; the Court refused to rescind the contract, or to restrain proceedings at Law upon it; since knowledge and non-communication of a fact which may influence the other party are not sufficient to rescind a contract; the fact must be, and be known by him who keeps it back to be, of sufficient importance to form a substantial element in the transaction, or there must be some active misrepresentation (2).

8. Where B. applied to an insurance company to insure his life, and in answer to a question contained in the form of proposal issued by the company, stated that Dr. D. was his regular medical attendant, and the company accepted B.'s proposal, subject to the following conditions:—That until actual payment of the premium they were not liable to any risk, and that any alteration in the meantime in the health of the party proposed for assurance since the date of the medical examination, would render the policy invalid; and that if any fraudulent or untrue statement was contained in any of the documents addressed to, or deposited with the company, the policy should be void; and in the interval

(1) *Pringle v. Hartley*, 3 Atk. 3rd Ed. 194.

(2) *Thompson v. Lambert*, Ir. Rep. 2 Eq. 433; 17 W. R. 111.

between the date of the medical examination, and the payment of the premium, B. consulted Dr. W.; upon a bill by the company, praying that the defendants might be restrained from taking any further proceedings upon the policy at Law, and that the policy might be declared to be void, and delivered up to be cancelled, Lords Justices Selwyn and Giffard held, affirming a decision of Vice-Chancellor Malins, that the statement made by B. that Dr. D. was his regular medical attendant, was a "continuing statement;" and that the fact of his having consulted Dr. W. was a material fact; and that the non-communication of it vitiated the policy; and that the policy must be delivered up to be cancelled; and the jurisdiction of the Court of Chancery in a case of this kind is clear. The assignee of a chose in action takes subject to the equities, notwithstanding the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144). A Court of Equity has concurrent jurisdiction in such a case with a Court of Law; and although the case may be one more properly tried in a Court of Law, a Court of Equity cannot, upon those grounds, decline to decide it (1). But in *Scottish Amicable Society v. Fuller* (2), where an assurance company filed a bill in order to have an action restrained and a policy brought into Court to be cancelled on account of the fraud alleged to have been practised upon them in obtaining it, it was held (it is submitted incorrectly, on the question of concurrent jurisdiction), that the company was not entitled to an injunction, as the facts alleged were a complete answer to the action, and that granting the injunction would neutralize the last-named Act, by the 2nd section of which it is enacted, that "in any action on a policy of life assurance, a defence on equitable grounds, or a reply to such defence on similar grounds, may be respectively pleaded and relied upon in the same manner and to the same extent as in any other personal action."

(1) *British Equitable Insurance Co.* (Ch.) 132, 314; 17 W R 43, 561; 19 v. *Great Western Railw. Co.*, 38 L. J. L. T. (N. S.) 476; 20 L. T. (N. S.) 42.

(2) 16 W. R. 274; Ir. Rep. 2 Eq. 53.

Assignee of a chose in action takes subject to the equities, notwithstanding the Policies of Assurance Act, 1867. A Court of Equity has in such a case concurrent jurisdiction with a Court of Law, and cannot decline to decide it (*sed vide infra*).

SECT. 3. *Bills of Exchange.*

1. Where a party, holder of a long over-due acceptance, had brought his action for payment; and it appeared by interrogatories administered to him in the action, that he had given a nominal sum only for such acceptance, an injunction was granted against his proceeding in the action, on the terms of the plaintiff giving judgment, to be dealt with as the Court should direct, and also giving notice of motion for decree forthwith (1).

2. Where bills of exchange, in the hands of foreign indorsees for value, were accepted in England, on the faith of the genuineness of a bill of lading, which was presented to the acceptor with the bills of exchange by the indorsees, but which afterwards proved to have been forged by the drawer, and the indorsees were unaffected with notice of the forgery when they obtained the acceptance; in a suit by the acceptor against the indorsees for delivery up of the bills, and an injunction against negotiating or proceeding at Law upon them, the Court held, that the fraud practised on the acceptor was no defence against the indorsee for value; and that fraud being a good defence at Law to an action on a bill of exchange, there is no ground for seeking relief in Equity, and dissolved an injunction granted by Vice-Chancellor Sir J. Stuart, restraining the indorsees from enforcing payment against the acceptor; and, *semble*, the bill would have been demurrable if it had not prayed that the bill of exchange might be delivered up. The Court also held, that on the defendants undertaking to deliver up the bills, in the event of the judgment at Law being against them, no injunction ought to be granted, and the bill was dismissed with costs (2). But on a bill for discovery, and an injunction to stay proceedings at Law upon a bill of exchange, and for the delivery up of the bill to be cancelled, charging fraud, which was not answered by the defendant, if the discovery obtained would be a defence at Law, an injunction to stay proceedings, though refused, will be granted to stay execution (3).

(1) *Simons v. Crilland*, 5 L. T. G. F. & J. 4; 1 Giff. 142; 1 L. T. (N. S.) 523. (N. S.) 50.

(2) *Thiedman v. Goldschmidt*, 1 De (3) *Houlditch v. Nias*, 8 Price, 689.

3. Where S. directed A. & Co., the Bombay branch of a Liverpool firm, to send him cotton, and draw a bill on him for the amount, and the bill was drawn, and accepted by S., but when the cotton arrived, S. refused to receive it, as having been improperly sent; and negotiations took place between S. and A. & Co., and the bill had been sent to the Liverpool firm, who had sent it to their London bankers to sue on it, if not punctually paid; and the London bankers, by their answer, denied all knowledge of the circumstances under which the bill was accepted, and of the negotiations; under the circumstances, an action, brought by the London bankers, was restrained (1). And, in a similar case, the Liverpool firm had drawn bills for the amount of cotton, which had been accepted by S., and the bills were handed over to the cotton brokers of A. & Co., A. & Co. expressing to them some doubt whether the bills would be paid; the brokers, however, took them, and gave A. & Co. their acceptance for a somewhat larger amount than the amount of the bills, and the brokers, by their answer, denied all knowledge of the circumstances under which the bills were given, and, except generally, of the disputes between S. and A. & Co.; under the circumstances, an action on the bills by the brokers was also restrained (2).

4. Where A., having accepted a bill, payable at his country bankers' town agents, deposited with the former an acceptance of a third party, with a note stating that it was intended to meet his own acceptance, and the country bankers not communicating the fact to their town agents the bill was dishonoured, and A. became bankrupt; and his bankers received the money on the second acceptance, and applied it to their own use; and the payee of A.'s acceptance brought an action against the country bankers for the amount they had received, but his only witness dying, he made default in going to trial, whereupon the defendant moved for judgment as in a case of nonsuit, which was refused by the Court, unless he would produce the note delivered by A. when the bill was deposited; and the defendant then gave notice of proceeding to trial by proviso, upon which the plaintiffs filed a bill for an injunction and a discovery, to which the defendant demurred, on

(1) *Sharp v. Arbuthnot*, 13 Jur. 160, 219.(2) *Ib.*

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the ground that the plaintiffs had not made out such a case as would entitle them to a discovery in Equity; but it was held, that inasmuch as the plaintiffs had made out such a case as afforded a reasonable ground for argument in a Court of Law, it was properly filed, and the demurrer was overruled (1).

5. Where a bill of exchange had been given by the plaintiff for a gambling debt, an injunction to restrain the defendants from suing in Ireland was, under the circumstances, continued (2).

6. Where A. B., very soon after coming of age, was induced by C. D., his superior officer, to accept bills for £3000, at two months, for his accommodation, which were handed by C. D. to E. F., a money-lender, in payment of a debt of £2590; and E. F., who was privy to the transaction, afterwards agreed to arrange the renewal of these and another bill for £500, for twelve months, in consideration of A. B.'s promissory note for £2500, payable in three years, which sum E. F. charged for his expenses and trouble; E. F. was, under the circumstances, restrained till the hearing from suing for the £2500 (3).

The Court will not restrain an action on a bill of exchange, merely because there may be a right of counter-action for damages in respect of the subject matter forming the consideration for the bill.

7. An injunction will not be granted to restrain an action on a bill of exchange on circumstances which merely shew a right to a counter-action for damages respecting the subject matter which was the consideration for the bill (4).

8. An injunction will be refused to restrain process on a bill of exchange, given by one partner to another, where the alleged set-off is in respect of the plaintiff's interest in the partnership effects and profits (5).

9. Where B. and C. had drawn two bills upon one another, in order to make an advance of £400 to D., and it had been agreed that mortgages should be prepared, and that the advance was to be made in the proportions following: £100 by B., and £300 by C.; and an agreement was accordingly prepared by E., the solicitor for all the parties, but this agreement did not contain any limitation of liability by B.; and C. having failed, E., being a creditor,

(1) *Thomas v. Tyler*, 3 Y. & C. 255;
8 L. J. (N. S.) Ex. Eq. 4.

(2) *Portarlington (Lord) v. Soulby*,
3 My. & K. 104.

(3) *Lloyd v. Clark*, 6 Beav. 309.

(4) *Glennie v. Imri*, 3 Y. & C. 436;
3 Jur. 432; *vide* S. C. p. 485, *ante*.

(5) *Wartnaby v. Shuttleworth*, 1
Jur. 469.

got both the bills indorsed to himself, and afterwards sued B. for the whole amount; it was held, that E. must be taken to have had notice of the agreement, and of the amounts to be paid by B. and C., and that the securities were to be applicable to the payment of the two bills, and also, that parol evidence was admissible, not to vary or add to the written agreement, but to shew the instructions and directions given to E. for him to prepare the securities (1).

10. The object of the bankrupt laws is to secure an equal distribution of the property of the bankrupt among his creditors; and therefore where there is a deed of composition, a private bargain, whereby one creditor is to receive a larger sum than the others, will be set aside (2). And where the Court interferes to set aside a transaction of a secret bargain between a bankrupt and his creditor, it does so on the ground of public policy. And where the plaintiff had presented a petition to the Court of Bankruptcy for an arrangement with his creditors, but the proposal which he made was not, at the private sitting of the Court for that purpose, assented to, and he was adjudged a bankrupt; and amongst the creditors who proved were the defendants; and previously to the meeting, they, by arrangement with the bankrupt, assigned their debt to a third person, with full power to act in all matters in reference thereto, they receiving a composition of 5s. in the pound; and the bankrupt in the first instance intended to offer that sum in the pound to all his creditors, but the offer was subsequently made at a lower rate, and the defendants refused to enter into any arrangement except they were secured a further composition of 5s. in the pound; and the bankrupt having agreed to the proposition of the defendants, a bill of exchange for the sum had been drawn by S. M. upon and accepted by the bankrupt and indorsed by him to the defendants, and the bankrupt then called a meeting of his creditors, and offered 4s. in the pound, and it was accepted by nine-tenths of the creditors present at that and at a subsequent meeting, and the adjudication was thereupon annulled; and the bill of exchange not being paid at maturity, the defendant sued the bankrupt and obtained judgment by default for the sum claimed; Vice-Chancellor Sir J. Stuart, on a bill by the bankrupt, granted a perpetual

The object of the bankrupt laws is to secure an equal distribution.

The Court sets aside a secret bargain between bankrupt and creditor, on grounds of public policy.

The Court will restrain an action on a bill of exchange given by a bankrupt to one of his creditors, as a preferential and secret consideration, to obtain their consent to annul the adjudication.

(1) *Gemmell v. Muculister*, 9 Jur (N. S.) 285.

(2) *Mare v. Sandford*, 5 Jur. (N. S.) 1339; *vide* S. C. p. 364, *ante*.

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injunction restraining the defendants from proceeding to execution, and ordered them to enter up satisfaction on the judgment for the amount claimed, and to deliver up the bill of exchange to be cancelled, it being illegal and void (1).

11. Where a bill payable to the order of C. D., a married woman, had been remitted by trustees to her in respect of her separate estate, and her husband, J. D., surreptitiously obtained possession of it, and without her knowledge forged her name on the back, and then indorsed his own name, and gave the bill to P. to get it discounted, stating that she had indorsed it; and P. got it discounted, and in order to do so, was obliged himself to indorse it, and he then paid the proceeds to the husband, who then absconded; and the acceptor, in consequence of notice from C. D., who had discovered the fraud before the bill became due, refused to pay the holder at maturity, who therefore had recourse to P., who paid the holder, and then sued the acceptor; and a suit having been instituted by C. D. to establish her title to the bill, and to restrain P. from suing the acceptor, Lords Justices Knight Bruce and Turner held, reversing a decision of the Master of the Rolls, Sir J. Romilly, that P. was to be treated as a purchaser of, and a *bonâ fide* holder of the bill for value, and as such legally entitled to the bill, and that the Court would not interfere to defeat his title; and also, that assuming P. to have had notice that the bill was drawn in respect of C. D.'s separate estate, yet, as there was nothing to excite suspicion of the forgery, he was justified in relying on the husband's statement that the bill had been indorsed by her, and he was not bound to make further inquiries than he made; and that there was, therefore, no equity to restrain him from the assertion of the legal title, which he had acquired by the husband's indorsement, and dismissed the bill with costs; and Lord Justice Knight Bruce said, as to whether the fact that P. was aware that the plaintiff was the wife of J. D., and that she was so at the time when the bill was drawn, amounted to notice, actual or constructive, to him, that it was drawn in respect of her separate property, it was unnecessary to give, and that accordingly he did not give, any opinion (2).

- (1) *Mare v. Sandford*, 5 Jur. (N. S.) 41; 27 L. J. (Ch.) 169; 4 Jur. (N. S.) 1339; *vide* S. C. p. 364, *ante*. 497; 3 Jur. (N. S.) 903; 26 L. J. (Ch.) 849.
(2) *Dawson v. Prince*, 2 De G. & J. 849.

12. Where indorsees of bills of exchange, as a security for a floating balance due on the accounts between them and the drawer, had notice that the acceptance was for the drawer, and they afterwards entered into an agreement with the latter that the existing debt should be liquidated by the drawer building for them certain ships, and should in the meantime be secured by a policy of assurance; the Court held that time was thus given to the principal debtor, and that the surety was released in Equity, if not at Law also; and, also, that a creditor who holds floating guarantees for a surety cannot, without the surety's consent, give time to the principal debtor as to a portion of the debt, without reserving the creditors' right against the surety, and yet hold the surety liable for that portion; and that whether the acceptor could or could not use, by way of defence to an action by the holders of the bills, the giving of time by them to the drawer, he was not bound to do so, but might (at the risk of costs) defend the action on other grounds, and also institute a suit for equitable relief, and for an injunction to restrain the proceedings at Law, though if the matter had been pleaded at Law, and the Court of Law had adjudicated on the plea, the case might have been different (1).

13. If a case of fraud is made by a bill, and is not established by the evidence, and another case for relief is alleged in the same bill and proved, the true rule is that so much of the bill is to be dismissed as relates to the charge of fraud, and that relief may be given upon the other part of the case which is established (2); but if a case of actual fraud is alleged, the plaintiff cannot fall back upon a case of constructive fraud (3). In the case of *Parr v. Jewell* (4), the bill alleged that the plaintiff, without consideration, gave a promissory note, and accepted certain bills of exchange for the accommodation of A.; and that A. discounted the note and negotiated the bills for his own use, and paid them before or after they became due, and told the plaintiff that he had done so, and that he was ready to give them up to the plaintiff. The bill also alleged, that A. afterwards fell ill, and when he was near his death his son found among his papers the note and bills uncan-

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Indorsees of bills of exchange as security for a floating balance between them and drawer, with notice that the acceptance is for the drawer, giving time (here) to the principal debtor, releases the surety in Equity, if not at Law also. And whether the acceptor can or cannot use, as a defence to an action at Law by the holders, the giving of time by them to the drawers, he is not bound to do so, but may institute a suit to restrain the proceedings at Law.

(1) *Davies v. Stainbank*, 6 De G. M. & G. 679.

(2) *Parr v. Jewell*, 1 K. & J. 671.

(3) *Wilde v. Gibson*, 1 H. L. C. 605; *Parr v. Jewell*, 1 K. & J. 671, 674.

(4) 1 K. & J. 671.

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celled, and handed them over to B., who gave them to the defendant, and that the defendant knew when he received them that B. had obtained possession of them without the sanction of A., and without consideration; and the bill sought to have the note and bills delivered up, and to restrain an action by the defendant upon them. The case came on for hearing before the action had been tried. The Vice-Chancellor, Sir W. P. Wood, said: "The fraud charged here is one of a gross description—that of bills being stolen from one person and handed over to another, who knew that they were so stolen, without a shadow of right passing by any part of the transaction. I do not say (indeed it is not necessary for me to say), but I have great doubt whether or not, that being the case stated in the bill, the plaintiff could fall back on this case—namely, that the defendant knew very well that these bills were negotiated as accommodation bills, and as accommodation bills only, and had personal knowledge of the fact that as between A. and the plaintiff they were accommodation bills, and knew, therefore, that as between A. and the plaintiff there was a distinct agreement that they should not be negotiated when overdue; and that, having a perfect knowledge of that agreement, he was content to take them, not as averred in the bill, from a person who had surreptitiously taken them from A., but that the defendant took them from A. with full knowledge of those circumstances. That would be utterly inconsistent with the fraud alleged in the bill." That, "according to *Charles v. Marsden* (1), it is not enough to aver that these were accommodation bills, and that the party took them knowing that they were accommodation bills; but the plaintiff must plead some specific agreement that they were not to be negotiated when they were overdue. Therefore, in order to arrive at any possibility of giving relief to the plaintiff on the pleadings in this case, consistently with *Wilde v. Gibson* (2), having given to the plaintiff the advantage of conceding that he might fall back on a case, not of constructive notice, but of positive distinct notice to the defendant Jewell, that the bills were for accommodation; and positive and distinct notice that they were not to be negotiated after they were overdue; I have to consider whether, supposing that course to be now open to him, I have such conclusive evidence of these facts as

(1) 1 Taunt. 224.

(2) 1 H. L. C. 605.

will justify me in disposing of this case without the intervention of a jury; and I am bound to say that I have not such evidence as can satisfy my mind on the point." And the Vice-Chancellor directed that the cause should stand over until after the trial of the action, the plaintiff at Law being put under an undertaking to proceed forthwith to trial.

14. Where, upon a suit for the delivery up of a bill of exchange for £262 10s., accepted by a very aged captain in the navy, who died in Greenwich Hospital, in favour of a dentist, who indorsed the same to C., to whom he owed about £14, on the understanding that C. should bring an action on it for their joint benefit; and the dentist stated at one time that £100, part of it, was for medical attendance and the rest a gift, and at another time that the consideration for the bill was a verbal agreement or contract that the dentist should, during the captain's life, attend to his teeth, and supply him with new ones as occasion might require; Vice-Chancellor Sir J. L. Knight Bruce held, that the captain's executors were entitled to have the bill delivered up (1). In this case, A., the executor of the captain, filed a bill against the defendant, stating that the defendant had fraudulently obtained a bill of exchange from the captain, and praying that the bill might be delivered up; and it appeared that an action had been brought, by the direction of the defendant, on the bill, and that, after the evidence for the defendant, the plaintiff in the action, had been gone into, the counsel for the plaintiff at Law had elected to be nonsuited; but the plaintiff at Law declined to give the Court of Chancery any undertaking to have another action tried at the next assizes; the Court, taking into consideration the alleged fraud, and being satisfied that an inference of fraud was to be drawn, ordered the bill to be delivered up.

15. Where B., the owner of certain bills accepted by F., attached by proceedings in the Lord Mayor's Court, in the hands of C., a large sum of money belonging to F., and F. filed a bill to restrain the action, and a special injunction was granted, and the money was paid into Court by the garnishee, and B. by his answer denied the whole of the equity suggested by the bill; the Court held, that though the injunction must be dissolved, the money in Court

(1) *Allen v. Davis*, 4 De G. & S. 133; 20 L. J. (Ch.) 44.

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would not be paid out to B. before he had obtained judgment in the action (1).

16. Where A. accepted a bill of exchange for £150, drawn by and for the accommodation of B., and B. indorsed the bill, and then, in order to facilitate its being discounted, procured C. to indorse it, B. being the first and the defendant the second indorser; and B. subsequently, and before it became due, delivered the bill to a person who advanced him £100 upon it; and when the bill became due the holder demanded payment of the £100 from C.; and C., some weeks afterwards, took up the bill by giving the holder a new bill of exchange for £160, and the holder then paid him a further sum of £50, in addition to the £100 he had formerly paid to B.; and C. brought his action against A. upon the bill, and A. filed his bill to restrain the action and have the bill delivered up; the common injunction which had been obtained was dissolved on the merits, and C. recovered judgment in the action, and at the hearing the bill was dismissed for want of equity, with costs (2).

Though a company has not power under the Companies Act, 1862, s. 47, to issue negotiable instruments, it can do so, if the memorandum and articles give power to the directors to do all things, &c., necessary, &c., to carry into effect the object mentioned in the memorandum.

17. Lords Justices Cairns and Turner, in *Peruvian Railways Company v. Thames and Mersey Marine Insurance Company* (3), held, overruling a decision of Vice-Chancellor Malins on this point, that under the Companies Act, 1862, sect. 47, a company, not otherwise having this power, has not power to issue negotiable instruments; and therefore to accept bills of exchange; but that the power existed in this case, and was conferred by the general words in the memorandum and articles giving a power to the directors to do all things and make all contracts which in their judgment were necessary and proper for the purpose of carrying into effect the object mentioned in the memorandum; and therefore, on that ground dismissed an appeal from the Vice-Chancellor, who had refused an injunction to restrain an execution under a judgment obtained upon bills of exchange issued by the Peruvian Railways Company, Limited.

18. Where a bill of exchange was intended to be drawn by the defendant, and given to the plaintiff in renewal of a former bill,

(1) *Furnival v. Bogle*, 4 Russ. 142.

(3) L. R. 2 Ch. 617; 36 L. J. (Ch.)

(2) *Hammon v. Sedgwick*, 6 Hare, 864.

but by mistake the name of the plaintiff appeared as drawer; and to an action on the bill the defendant pleaded that the name of the plaintiff appeared as the drawer thereof, and the plaintiff filed a replication stating that the plaintiff's name was inserted in the bill by mistake; and the defendant joined issue upon this replication; and before trial the plaintiff instituted a suit in Equity to rectify the bill by striking out her name, and to restrain the defendant alleging in the action or trial that the plaintiff was jointly with himself, or otherwise, a drawer of the bill, and from issuing execution under any judgment he might obtain in the action, without leave of Court; Vice-Chancellor Sir W. P. Wood overruled a demurrer by the defendant, on the grounds of the non-admissibility of evidence in an action by the plaintiff at Law to prove the real contract, and of the established jurisdiction in Equity to correct mistakes in documents (1).

19. Where A. accepted bills for B., some of which were discounted by C., B. guaranteeing their payment at maturity, and the bills were renewed from time to time; and B. agreed with C. that, in consideration of his depositing with C. certain securities, C. should retire the bills, and, as was alleged, absolve A. from liability on them, and the securities were deposited; and when the bills arrived at maturity, C. wrote to A. requesting payment; and B. and C. came to a settlement of accounts, and in consideration of certain other bills, and of a sum of money paid by B. to C., C. agreed to return B. the bills; and C. brought an action against A. on the bills accepted by A.; and A. filed a bill asking for a declaration that, by the settlement of accounts, the bills had been paid and discharged, and ought to be cancelled, and to restrain the action; Vice-Chancellor Sir R. Malins held, that the transaction did not amount to a payment of the bills, or to a giving of time to the principal debtor (2). The Vice-Chancellor said his opinion was that these bills were not accommodation bills; and that if they had been, the transactions did not amount to a settlement, or to a giving time, and that no time had been given; and that the plaintiff must, therefore, pay the bills and the costs of the suit.

(1) *Druiff v. Parker* (Lord), L. R. 5 Eq. 131; 37 L. J. (Ch.) 241; 18 L. T. (N.S.) 46; 16 W. R. 557.

(2) *The Oriental Financial Corporation (Limited) v. Overend, Gurney, & Co.*, 19 W. R. 869; 24 L. T. (N. S.) 774.

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20. An injunction in force against the negotiation of a note does not destroy its negotiability (1).

21. Where a person has lent his name, as maker of a note, to enable the borrower to keep up a false credit by using the paper as business paper, he cannot come into Court for relief against the consequences (2).

22. Two notes, given for the purchase money of two distinct tracts of land, but bearing date and executed on the same day, do not thereby become parts of the same transaction, nor so blended together that an eviction from one of the tracts will enable the vendee to enjoin the collection of the note given for the other (3).

23. Where A. and B. gave a bond for title to land to C., who paid a part of the purchase money and gave his notes for the balance, three to A., and three to B.; and C. being unable to pay, it was agreed between the parties that the contract should be rescinded, and the bond was surrendered; and A. and B. delivered to C. his notes, except one which A. had assigned to D.; and on this note D. afterwards recovered judgment against C., who filed a bill to enjoin its collection, making A. and D. parties; it was held that B. was not a necessary party; and that C. was not entitled to an injunction against D.; and that the contract having been rescinded, A. would be liable to C. for the note he had assigned, whenever C. should pay the judgment, or A. should be otherwise released from his liability to D (4).

SECT. 4. *Promissory Notes.*

Persons paying moneys to a party acting *in loco parentis* by the directions of persons of tender years, although of age, should see that they

1. Notwithstanding the general rule, that the onus is on the maker of a negotiable instrument to shew that it has been paid, the holder is bound, in the first place (unless he be a derivative indorsee for value during the currency of the bill or note), to shew that the maker received value for it. Persons who pay moneys to a party acting *in loco parentis*, by the directions of persons of

(1) *Winston v. Westfeldt*, 22 Ala. 760 (Amr.)

(2) *Davenport v. City Bank*, 9 Paige, 12 (Amr.)

(3) *Wray v. Furniss*, 27 Ala. 471 (Amr.)

(4) *Drake v. Lyons*, 9 Gratt. 54 (Amr.)

tender years, although of age, should see that such persons understand the nature of the transaction, and that they have had independent advice. And where, by the direction of two ladies of the ages respectively of twenty-two and twenty-one, certain sums were advanced by the manager of a bank, and carried to their respective accounts with the bank, and at the same time they gave a joint and several promissory note to the bank for £4000 advanced to their uncle (in whose power they unreservedly were, and who stood *in loco parentis* to them) by the bank at their request, and that amount was carried to his account; and subsequently the uncle drew out, at various times, the greater part of this money, and used it for his own purposes, and on the note becoming due the bank sued the ladies; the action was restrained perpetually, and the security declared to be invalid except as to such sums as the plaintiffs, the ladies, actually received; and the defendants were ordered to pay the costs (1). And, on the same principle, where a promissory note appeared to have been signed by a lady in her twenty-second year, as surety for her stepfather, in whose house she had been residing with her mother for many years previously, the Court restrained execution against her on a judgment obtained by the payee (2). And so where A. and B. had consented to postpone the payment of £5000 due to them from C., in consideration of C. procuring and giving them the plaintiff's guarantee for that sum; and C. at the same time informed A. and B. that the plaintiff was his niece, and was possessed of considerable property; that she had resided with him for some time; that he had been her guardian, and that she had been of age for about a year and a half; and afterwards another arrangement was made between A., and B., and C., in pursuance of which A. and B. delivered up the guarantee, and C. procured and gave them the plaintiff's cheque for £3000, and her promissory note for £1200, as securities for his paying them those sums; the Court granted and afterwards continued an injunction restraining A. and B. from prosecuting an action against the plaintiff to recover the £3000; and, notwithstanding they had obtained a verdict, it refused to order the money into Court (3).

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understand
the transac-
tion and have
independent
advice,
otherwise the
Court will
restrain
actions upon
notes given as
securities for
the moneys.

(1) *Dettmar v. Metropolitan and Provincial Bank (Limited)*, 1 H. & M. 641; 10 L. T. (N.S.) 63.

(2) *Espey v. Lake*, 10 Hare, 260.

(3) *Maitland v. Irving*, 15 Sim. 537.

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2. Where an apprentice, after serving part of his time, ran away from his master, it was held that the latter was not bound to receive him again, or to return part of the apprentice fee; and that notwithstanding a refusal to take the apprentice, the holder of a promissory note given for the amount of the fee would not be restrained from recovering the amount at Law (1).

3. The holder of a promissory note, a *bonâ fide* creditor, and having no knowledge of its illegal origin, delivered to him without indorsement, after it is become due and noted for non-payment, will not be stayed by an injunction from enforcing a judgment at Law obtained by default, although the note was originally given to a broker in respect of illegal stockjobbing transactions (2).

4. Where a bill stated that the defendant, being a mortgagee of leasehold houses, the equity of redemption of which was in the plaintiff (who had been made a trustee for all parties when the mortgagor's affairs became embarrassed), brought an action upon a guarantie which had been given to him by the plaintiff; that the action was compromised by the plaintiff giving promissory notes to the amount of the mortgage debt, and that the defendant, after the property had been sold and he had received the money due on his mortgage, proceeded with an action on the notes; and a part of the transaction was, that the defendant's solicitor had taken a transfer of a mortgage of the property from the defendant; and the bill prayed for an injunction to restrain the action, and for a delivery of the notes; Vice-Chancellor Sir R. T. Kindersley overruled a general demurrer for want of equity, and also a demurrer *ore tenus*, on the ground that the solicitor ought to have been made a party (3).

A surgeon restrained from suing on a promissory note given by a patient obtained by undue influence, the note to stand as a security only for the amount due.

5. Where a bill sought to restrain the defendant from proceeding to recover the amount of a promissory note for £325 on two grounds: first, that the plaintiff had signed it in the belief that it was for £25 only; and, secondly, that it was given by the plaintiff, a patient, to his medical attendant on the occasion of an accession of fortune to the family of the patient, without any account delivered, and for an amount more than would be due for medical attendance on the most extravagant scale of charges; the

(1) *Cuff v. Brown*, 5 Price, 297.

(3) *Robinson v. Brocklebank*, 12 W.

(2) *Dunbar v. Wilson*, 6 Bro. P. C. R. 331.

Court, on proof of the circumstances constituting the second ground for relief, held, that the plaintiff was entitled to a declaration that the note should stand as a security only for the amount due for medical attendance on the plaintiff, although the case of the plaintiff, as to the first ground of relief sought by his bill, was wholly disproved; and that the plaintiff in Equity, having an equitable as well as a legal defence to the action on the note, and having filed his bill, was not bound to go into evidence at the trial at Law to establish his legal defence, but might rely on his case in Equity (1).

6. On a bill for an injunction to restrain proceedings at Law, on a note alleged to be fraudulent and void, the Court enlarged publication beyond the following term to enable the defendant to obtain evidence to be read at a new trial (2).

7. Where A. had given his promissory note to B., who, by deposit thereof at a bank, raised money, which he paid to A., being indebted to him, and accounts were subsequently settled between A. and B.; but the promissory note remained at the bank, and, the money being still due by B. to the bank, B. had become insolvent; and the bank then brought an action against A. for the note, but A. insisted that the note had been discharged by B. in the course of his dealings with the bank; the Court granted an injunction to restrain the action at Law, and directed inquiries—first, whether B. was a consenting party to the state of the accounts in the bank books; and, secondly, whether the sums paid into the bank by B. were paid in with specific appropriations (3).

8. Where the plaintiff, being insolvent, agreed with his creditors that they should take 15s. in the pound in satisfaction of their debts, and one of the creditors refused to come in unless the plaintiff gave his promissory note for the remainder, which was done, and there was no stipulation in the composition deed that all the creditors should accede to it in a given time, nor did it appear, in fact, that all the creditors had done so; the Court restrained the defendant from proceeding at Law on the promissory note (4).

(1) *Billage v. Southee*, 9 Hare, 534;
S. C. *sub. nom. Billing v. Southee*, 21
L. J. (N. S.) Ch. 472; *vide* S. C. p. 364,
ante.

(2) *Hendrick v. Abbott*, 4 Y. & C.
255.

(3) *Mostyn v. Burdekin*, 3 Jur. 52.

(4) *Constantein v. Blache*, 1 C. & L. 287.

1. Where the defendant, being possessed of a leasehold estate for the residue of a seventy-five years' term, and being desirous of underletting the same for the whole term, save a few days, at an increased reserved rent, advertised as for sale by private contract "the residue of a long leasehold estate, at a moderate ground-rent," with various encomiastic expressions of the investment, and a reference to himself for further information, but not stating that he was himself the vendor; and this advertisement was seen by the plaintiff the day before the last day fixed for the sale, and he immediately saw the defendant, and was by him referred to an agent near the premises, who induced the plaintiff not to inspect the premises closely, and to sign a contract, which the agent stated to be a usual and proper form for the purchase of leasehold estates at a ground-rent; but this contract was, in fact, an agreement to pay a considerable premium for an underlease from the defendant, at a rent which appeared to be a full rack-rent, and the agent at the same time dispensed with the payment of the deposit, taking an *I. O. U.* from the plaintiff, who was a perfect stranger; Vice-Chancellor Sir W. P. Wood held, on the whole circumstances, that the plaintiff was entitled to have the *I. O. U.* (an action upon which had been restrained by an interim injunction) and the contract delivered up to be cancelled, on the ground of fraudulent misrepresentation, and that the plaintiff was entitled to his costs, except the costs of the action at Law upon the *I. O. U.* (1).

 SECT. 6. *Bonds.*

1. Where a policy of life insurance had been effected as part of a family arrangement to secure to the wife and children of the insured a sum of money, and the husband, in breach of the condition of a bond which he had executed, omitted on one occasion to pay the premium on the policy, whereby the insurance dropped, but afterwards revived it; the Court, under the circumstances,

(1) *Bartlett v. Salmon*, 1 Jur. (N. S.) 277.

and being of opinion that the manner in which the object and intention of the insurance and bond had been described to the husband, in a correspondence on the subject, had misled him, and that he was mistaken as to the consequences of the omission to pay the premium, restrained an action on the bond in respect of such breach, upon the terms of the husband paying the costs (1).

2. Where A. B. entered into a bond as a surety, and the creditor subsequently took from the principal debtor a promissory note for the amount, payable in two months, but afterwards, in consequence of the insolvency of the debtor, sued A. B. on the bond, and A. B. then filed his bill to restrain the action, on the ground that he was discharged from liability by the giving of the promissory note; and the creditor, by his answer, denied that such was the effect of the transaction; and, on the hearing, an inquiry was directed in respect of the circumstances under which the promissory note had been given; and the Master reported that though there was not any written nor any distinct parol agreement between the parties, yet there was a general understanding that the giving of the note was not to affect the bond; the Court held, on further directions, that, under the circumstances, there was no case for the interference of a Court of Equity (2).

3. Where, in 1827, a bond to secure the payment of a sum of money was given to S. by L., and M. joined in the bond as surety; and in 1829 L. died; and in 1832 S. brought an action in Ireland against M. upon the bond, and M. then filed a bill in Ireland for an injunction to restrain the action, on the ground that the bond was founded on a gambling transaction; and an injunction was granted; and subsequently a decree *nisi* for taking the bill *pro confesso* was made against S., and the order was served upon him two days before his death, which happened in 1833; and in 1837 S.'s personal representatives brought an action upon the bond against M. in England, and M. then filed a bill for an injunction; and S.'s representatives, in their answer, stated that they were entirely ignorant as to the nature of the consideration for the bond, and that they had found among S.'s papers certain memorandum books relating to bets upon horse races, which books they

(1) *Shearman v. M'Gregor*, 11 Hare, 106.

(2) *Wyke v. Rogers*, 1 De G. M. & G. 408.

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had destroyed as useless; but they denied that the books shewed the consideration for the bond; upon the answer, Vice-Chancellor Sir L. Shadwell granted an injunction, which was continued upon appeal to Lord Chancellor Cottenham, without obliging the plaintiff to bring the money into Court (1).

4. Where A. bequeathed to B. £700, part of £1200 which B. owed him by bond, and A. afterwards revoked the bequest, but made an indorsement on the bond, by which he forgave B. the £700; and A.'s executors brought an action against B. for the £1200; and B. filed a bill to restrain the action, offering to pay to the executors the balance of £500; the Court refused the injunction, because B. had given no consideration for the indorsement on the bond (2).

If it is doubtful whether an agreement for giving time was made to one surety, proceedings against a co-surety will be restrained.

5. Where it is doubtful whether an agreement for giving time was made by the obligee of a bond with a surety, either as principal or as surety, an injunction to stay proceedings against a co-surety will be continued (3).

6. Where A. and B., partners, gave a joint and several bond to C., who afterwards became indebted to A.; and B. then became bankrupt, and C. proved the bond under the commission, and then brought a joint action against A. and B., to which B. pleaded his certificate; A. being by this form of action precluded from setting off his separate debt, applied for and obtained an injunction against C.'s proceeding in the joint action (4).

7. Where a bond was given to a trustee, which only recited that the obligor was (on the resignation of the obligee's *cestui que trust*) appointed to an office, an action at Law on the bond was not restrained; on the ground that it could be pleaded at Law in order to try whether the consideration was corrupt (5).

8. Equity will enjoin proceedings upon a bond conditioned for the receipt of the money, although there be a breach of condition, provided nothing be due (6).

9. Where there was a bond for performance of covenants to

(1) *Milltown (Earl of) v. Stewart*, Ex. Eq. 8; 1 Y. & C. 420; 4 L. J. 3 My. & Cr. 18; 8 Sim. 371. (N. S.) Ex. Eq. 48.

(2) *Tufnell v. Constable*, 8 Sim. 69. (4) *Bradley v. Millar*, 1 Rose, 273.

(3) *Blake v. White*, 5 L. J. (N. S.) (5) *Thrul v. Ross*, 3 Bro. C. C. 57.

(6) *Peek v. Payne*, Ridg. 295.

build a bridge, and the sum agreed for actually paid, an injunction was granted to restrain an action on the bond, and an issue *quantum damnificatus* ordered; the Master of the Rolls, Sir Lloyd Kenyon, observing that, upon examining the authorities, he could not distinguish this from the other cases of penalties (1).

10. Where A. filed a bill against B. to recover divers sums on account, and also £10,000 on a stale bond of above twenty years' standing, and the defendant demurred as to what related to the bond, on the ground that the plaintiff might sue at Law, and the demurrer being allowed, the obligee sued upon the bond at Law, and, on *solvit ad diem* pleaded, obtained a verdict; after which the defendant filed a bill to be relieved against the bond as having been satisfied, the Court ordered an injunction on the ground that if it was merely to secure a provision on a settlement, which had been done, or that the bond had been satisfied by a transfer of stock in pursuance of the agreement for the settlement, or in any other way, there was no doubt that the obligor, under these circumstances, ought to be relieved in Equity, though the defendant had demurred to the bill brought on the bond (2).

11. In *Osborne v. Havers* (3) relief was granted against a bond to make a jointure in consideration of a payment which was never made.

12. Where a bond creditor by agreement with his debtor took interest on his debt by anticipation, a Court of Equity would, prior to the abolition of the usury laws, restrain an action on the bond, whether brought against the principal or the surety (4).

13. Where, on the occasion of a sale of a freehold estate, it was agreed that the purchase-money should be paid in railway bonds, and the purchaser deposited with, and assigned to, A., who alleged himself to be the solicitor of the vendor, one of such bonds in part payment of the purchase-money, and the contract turned out to be a fraud on the purchaser, and went off; and on the purchaser applying to A. for the return of the deposited bond, he was informed that A. had placed it in the hands of B. to secure a debt due from himself to B., and B. had no notice of the terms upon

(1) *Errington v. Aynesly*, 2 Bro. C. C. 341; Dick. 692.

(3) Cary, 112.

(2) *Humphreys v. Humphreys*, 3 P. Wms. 395.

(4) *Blake v. White*, 1 Y. & C. 420.

An injunction will be granted to restrain proceedings at Law on a satisfied bond, though the defendant at Law has demurred to a bill on the bond.

Bond to make a jointure for a consideration not paid relieved against.

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which A. held the bond; the Court held, in a suit by the purchaser against B. to restrain him from dealing with the bond, that the deposit and assignment of the bond by the purchaser to A. for the purpose mentioned did not make A., in the events which happened, a constructive trustee for the purchaser; that it only created a right of action against him to recover the deposit in case the purchase went off, and that the depositee could not be considered a trustee; and that, as B. was a *bonâ fide* purchaser of the bond for value without notice, he could not be restrained from dealing with it (1).

14. Where A., while a *feme sole*, had become the owner of a bond and warrant of attorney upon which judgment had been entered up, into which B. had entered to secure the payment of a sum of money; and the two persons were on the most intimate terms, and B. was about to marry, and A. being informed of that fact, told him and others, "I will not distress you about the bond: I have given it up: I shall never enforce it;" but on being requested to give up the bond in fact, she said "No, I will be trusted, but he may rely on my word;" and these declarations were made under circumstances which were calculated to lead, and which did lead, to the communication of them to the friends of the intended wife; and B. married; and A. afterwards married, and her husband and herself commenced proceedings at Law to enforce the securities; upon which B. filed a bill for an injunction to restrain them from proceeding, alleging that he had married on the faith of the promises made by B.; Lord Justice Knight Bruce—agreeing with the Master of the Rolls, Sir J. Romilly, who had held that the Court will restrain a party from enforcing a legal claim where promises have been made to the person legally liable not to enforce it, upon the faith whereof obligations have been entered into; and that as A. had by her representations induced B. to enter into irrevocable engagements, she could not repudiate her assurances; and had granted a perpetual injunction to restrain the proceedings to enforce payment, and had directed satisfaction to be entered upon the judgment, with costs—held, that the declarations above-mentioned afforded possibly sufficient ground for the interposition of a Court of Equity to restrain proceedings at Law upon the

(1) *Ashwin v. Burton*, 11 W. R. 103; *vide* S. C. pp. 208, 373, *ante*.

bond, and there being, in addition, the testimony of one witness to a positive promise to the above effect, in consideration of another promise on the part of the witness, which he performed. The Lord Justice Knight Bruce also held, that although this promise was denied by the answer, yet that the answer being in many respects inaccurate, shewed that the defendant's memory could not be depended on, so that the testimony of the witness ought to prevail; and that the case was a proper one for a perpetual injunction, a decree for which was accordingly affirmed, *dissentiente* Lord Cranworth, who held, that the declarations being of intention merely, and not of fact, were not such representations as to bind the creditor on the ground of fraud or otherwise; and that an actual contract could not, in opposition to the answer, be considered proved by the evidence of one witness. But it was held that forbearance to make a new settlement upon an intended marriage would be a sufficient consideration to support the release of a debt due to a person who was a *cestui que trust* under an existing settlement, which appeared to be voluntary, although it might be doubtful whether that settlement was voluntary, or could have been defeated by a subsequent settlement. But the House of Lords held, reversing the decree of the Master of the Rolls, and the affirmation of the same in the Court of the Lords Justices, that B. was not entitled to an injunction, for that what passed between the parties was neither a legal contract nor a misrepresentation of facts, but only an expression of intention, the performance of which could not be enforced (Lord St. Leonards *dissentiente*) (1). The bill filed by B. alleged that a part of the consideration for A.'s promise was the absolute conveyance by B.'s father to A. of a house in India, which house he had only previously transferred to her by a voluntary conveyance; the House of Lords held, that the Statute of Frauds did not apply to this case (2).

15. The Court, under the old practice, would not grant a special injunction against the assignees of a bond to restrain an action brought by them in the name of the assignor, before an answer had been made by them and the assignor; the Vice-Chancellor,

(1) *Jorden v. Money*, 23 L. J. (Ch.) G. 318; 21 L. J. (Ch.) 531; *vide* S. C. 865; *Money v. Jorden*, 2 De G. M. & pp. 179, 663, *ante*.

(2) *Ib.*

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Sir L. Shadwell, observing that he did not recollect an instance of an application for a special injunction before answer against the assignees of a *chose in action* (1).

16. An injunction having been obtained to restrain proceedings in an action on a bond, in which the plaintiff had joined as a surety, on the ground of misrepresentation on the part of the obligee, and a deviation by him, with the concurrence of the principal obligor, from the terms of the contract on which the bond was founded; and it appearing on the evidence that there was reason to suppose that there had been such misrepresentation and deviation, although the evidence was not conclusive on the point, the Court refused, on motion, to dissolve the injunction, or to put the plaintiff on the terms of bringing the money into Court (2).

17. Though an agreement for a composition generally is not binding on the creditors, unless absolutely and strictly fulfilled, yet a bond creditor having concurred in a general resolution for a composition to be secured by notes, was, under the circumstances, with reference to the interest of the other creditors, restrained from taking execution in an action upon the bond for non-payment of the notes, beyond the term of composition (3).

The Court restrained proceedings on a bond, assigned by a surety after the debt had been paid by the surety with the money of the principal.

18. Where A., together with B. and C., as his sureties, had executed a bond to D. for securing £300 and interest, and the debt was paid by C., with the proper money of A., but C. had neglected to deliver up the bond to A. to be cancelled, and C. afterwards produced this bond, to be assigned as a collateral security for a debt of his own; it was held by the House of Lords that this assignment was a gross fraud in C., and a perpetual injunction was granted to restrain all further proceedings upon the bond (4).

19. Where to a bill to be relieved for a sum of money secured to the plaintiff by a mortgage, and for which bonds were also given by the defendant, the defendant put in answer that the bonds were delivered by him as *escrows* only for the plaintiff's use, to be delivered over to the plaintiff upon the plaintiff giving a release, which he refused to do; and the defendant also pleaded a non-suit, upon full evidence, in an action of trover brought for the

(1) *Portarlington (Lord) v. Graham*,
5 Sim. 416.

(2) *Allan v. Inman*, 7 Jur. 433.

(3) *Mackenzie v. Mackenzie*, 16 Ves.
372.

(4) *Muy v. Harman*, 4 Bro. P. C. 156.

bonds; the Lord Chancellor allowed the plea as to the relief touching the re-delivery of the bonds, but the plaintiff had liberty to proceed on the answer to recover the money for which the bonds were given, and liberty to mention the entering into the bonds by way of evidence for the recovery of the said money (1).

20. A surety who has executed a bond on the faith of its being executed by the principal debtor, will not be relieved against the execution of a Common Law judgment upon the bond on the ground that the principal has not executed the bond, if the principal has executed an instrument on which the surety may sue him and become a specialty creditor of his. And where a coal agent had entered into an agreement, under seal, with the coal owners for the proper discharge of his duties, and a joint and several bond of even date by the coal agent and two sureties for the performance of this agreement was prepared and executed by the sureties, but not by the principal; and the agreement being broken, an action was brought against the sureties for the penalty of the bond, and judgment recovered; on a bill filed in Equity by a surety to restrain execution upon the judgment, the Master of the Rolls, Lord Romilly, held, first, that as the sureties might have the benefit of the agreement under seal, they were not discharged by the non-execution of the bond by the principal debtor, and upon properly indemnifying the coal owners, the plaintiff (the surety) would be able, in their names, to sue the principal, the coal agent, upon the above agreement, and become a specialty creditor of his, just as much as if he had executed the bond; secondly, that the doctrine of principal and surety is the same at Law and in Equity, and the plaintiff had raised at Law the same case as set up here in Equity; and the question was therefore decided by the judgment at Law (2).

A surety executing a bond on the faith of the principal executing it also, will not be relieved against a judgment on the bond on the ground of non-execution by the principal, if the principal has executed an instrument on which the surety may sue him, and become a specialty creditor of his.

The doctrine of principal and surety is the same at Law and in Equity, and a party raising the same case at Law and in Equity will not be relieved against the judgment at Law.

21. Where an obligor, without obtaining a legal release for his bond, gave a second bond, on the understanding that the first should be cancelled, and on the death of the obligee an action was brought to enforce the first bond; Vice-Chancellor Sir J. Stuart

The Court will restrain an action on a first bond, where a second has been given on to be cancelled.

the understanding that the first was

(1) *Wilcox v. Sturt*, 1 Vern. 77 (2nd Ed.)

(2) *Cooper v. Evans*, L. R. 4 Eq. 45; 15 W. R. 609; *vide* S. C. 614, *ante*.

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held, that the question was one for a Court of Equity, and an injunction was granted to restrain the action (1).

22. Where A. sold land to a company, of which B. was a member, and took B.'s individual guarantie on bonds given for the purchase-money, and at the same time A. made an indenture with the purchasers, covenanting that the lands in five years would sell for a certain price, and pledged therefor his stock in the company; and shortly after the sale A. deposited the bonds, as collateral security for a loan to himself, with the United States Bank, and the bank sold the bonds to C. and others; and A. became insolvent, the land depreciated greatly in value, and he was wholly unable to indemnify the purchasers; and the holders of the bonds brought suits on them against B., who filed a bill for an injunction against the suits, and prayed also that the lands might be sold, and the proceeds applied on the bonds; it was held, that while the bonds were in the hands of A., even before the expiration of the five years, B. would have been entitled, on a well-founded apprehension of loss, to a bill, *quia timet*, for an injunction restraining A. from selling the bonds, but as he had parted with them before his insolvency, that the rights of third parties had intervened, and that they must be protected against loss through equities existing between the original parties (2).

SECT. 7. *Guaranties—Legal Instruments.*

1. Where a written guarantie was given for moneys payable by instalments, which, though invalid, was not invalid on the face of it, and in an action for the first instalment the plaintiffs were *non-pros'd*; the Master of the Rolls, Sir J. Romilly, upon a bill for a declaration that the guarantie might be declared void and cancelled, and the defendants restrained from proceeding upon it at Law, held, that although there was a legal defence, the instrument ought to be cancelled, on the ground that future actions might fail from the loss of evidence (3). The Master of the Rolls

(1) *Whilmhurst v. Peerless*, 17 L. T. (N. S.) 313. (2) *Coster v. Griswold*, 4 Edw. Ch. 364 (Amr.)

(3) *Cooper v. Joel*, 27 Deav. 313; 1 De G. F. & J. 240.

said: "The principle upon which the Court orders a legal instrument to be delivered up is well expressed in *Simpson v. Lord Howden* (1), and the authorities there cited. That principle may be thus stated. If a legal instrument has stated on the face of it the defect which makes it impossible to sue at Law, this Court will not interfere; but if a legal instrument has no defect on the face of it, but by reason of the circumstances connected with it, it would be inequitable to allow a person to proceed at Law upon it, or if there be a good legal defence, not appearing on the instrument itself, which the lapse of time may cause the person chargeable upon the instrument, from loss of the evidence necessary for his defence at Law, to be unable to make available, then this Court will interfere, and order the instrument to be delivered up to be cancelled. To use the words of Lord Cottenham (2), the Court orders such documents to be delivered up in consequence of 'the danger that the lapse of time might deprive the party to be charged upon it of the means of defence.' I am, therefore, of opinion that the Court has jurisdiction in this case, because there is no legal defect apparent on the face of this guarantee."

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If a legal instrument has a defect stated on its face, which makes it impossible to sue at Law, this Court does not interfere, but if it would be inequitable to proceed at Law, or there is a good legal defence not appearing on the instrument, which may be lost by lapse of time, this Court interferes.

2. Where a case stands over (as here) in order that a party may proceed at Law, and he neglects to do so (here for a year and a half) the Court treats the case as if the legal right had been decided against him (3).

SECT. 8. *Shipping.*

1. The Court below, Vice-Chancellor Turner, restrained the registered owners of a ship from selling a vessel, or proceeding in the Admiralty Court in a case where H., the plaintiff, had contracted for the purchase of shares in the vessel, and had paid part of the purchase money to P., and had also obtained possession of the vessel, but no bill of sale had been executed; although the registered owners alleged that P. was not their agent to receive the money, and having arrested the vessel in the Admiralty Court,

(1) 3 My. & Cr. 97.

My. & Cr. 102.

(2) *Simpson v. Howden* (Lord), 3

(3) *Cooper v. Joel*, 27 BEAV. 313.

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the owners threatened to sell the shares (1). But the Court finally dismissed the claim for specific performance of the agreement for the sale of the shares, upon grounds depending upon the dealings between the parties, and independently of the Ship Registry Act; and upon appeal, the Lords Justices Knight Bruce and Cranworth affirmed this decision, but upon the ground that a contract for the sale of shares in a British vessel, not reciting the certificate of registry, could not be enforced in Equity.

2. Where a ship while at sea was mortgaged by the owner to the plaintiff, and the ship having become unseaworthy, was condemned and sold in a foreign port, and the purchaser drew upon a person in England a bill of exchange for the proceeds of the sale of the ship, and indorsed and delivered it to the captain, and the captain claimed a lien upon, or a right of set-off against, the amount of the bill, for disbursements which he had made on account of the ship, and threatened to bring an action against the acceptor for the money due on the bill; the Court, being satisfied that the bill represented the ship, granted an injunction against the defendant to restrain the action (2).

3. In *Kensington v. White* (3), where there was a strong suspicion of fraud in the party assured, on the money being paid into Court, the Court granted an injunction to restrain the plaintiffs at Law from proceeding further, where four of many actions against the various underwriters on policies on several ships (individually) had been tried, and verdicts passed for the plaintiff at Law.

4. Where N., a timber merchant in Sweden, had had dealings with D., a merchant in London, and sent him cargoes of timber, which D. disposed of on a *del credere* commission, and in respect of which N. drew bills on D.; and in September, 1853, the accounts between them were unsettled, but D. claimed a considerable balance as due to himself; and on the 29th of September N. wrote to say that he expected bills of lading from two captains (whom he named), and that he had drawn for a certain amount on D.; and on the 24th of October H. & Co., merchants in London, received through K., their agent, and the manager of their business in Sweden, a letter from N., in which he enclosed a letter to D.,

(1) *Hughes v. Morris*, 13 Jur. 1065; (2) *Lister v. Pym*, 11 Sim. 348.
9 Hare, 636; 2 De G. M. & G. 349; (3) 3 Price, 164.
vide S. C. p. 405, *ante*.

whereby he drew on D. for £1312, which he claimed as due to himself from D. and in the letter to H. & Co. N. desired this enclosure might be handed to D.; and on his accepting the draft, and acknowledging the correctness of an accompanying account, and the fact that N. had duly delivered all the cargoes of timber contracted for between them, except one, particularly named, that then H. & Co. were to hand to D. the three bills of lading of three ships, also named, but if he would not accept the draft, nor give the required acknowledgment, that H. & Co. were to insure the cargoes and sell them; and N. drew on H. & Co. drafts to the amount of £1300; and this letter was read to D., who hesitated to accept the draft for £1312, declaring that he was largely in advance of N.; and it was left in his bill box for acceptance on the morning of the 24th of October, and a formal letter, demanding compliance with the conditions of N., was written to him from H. & Co.; and in the course of the same day D. wrote to H. & Co. requesting the loan of the bills of lading, saying, "We will return them to you, if from any cause we do not accept the bill for £1312," and they were sent to him on the same day; but after D.'s request had been complied with, H. & Co. accepted the first of N.'s drafts, and wrote to him that they would "give protection" to all; and on the morning of the 25th of October a clerk of H. & Co. learned at D.'s counting-house that the draft for £1312 had not been accepted; but in the middle of that day it was sent to H. & Co. accepted, but D., however, refused to give up the bills of lading, and, on the advice of a solicitor (obtained before he had accepted the draft for £1312), attached the goods in the hands of H. & Co., and they brought an action against him to recover the bills of lading, upon which he filed a bill to stay the action; the House of Lords held that he had not such equitable right on account of anything occurring before the 24th of October as would prevail against the legal rights which H. & Co. acquired on that day; and that though he might have had a prior equitable claim to the shipping documents he had not properly insisted on it, and that he had thereby misled H. & Co., who had a legal right to recover them from him (1).

(1) *Hoare v. Drisser*, 7 H. L. C. 290; 5 Jur. (N. S.) 371; *vide* S. C. p. 408, *ante*.

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5. Where T., a shipbuilder, being owner of certain ships, and engaged in building a screw yacht, had induced the plaintiff to advance to him money from time to time to enable him to carry on the business; and in October, 1856, T. gave to the plaintiff a memorandum whereby he undertook, in consideration of such advances, to receive, as the plaintiff's agent, the amount due to him, T., for the yacht, and to account to the plaintiff for the same, the amount being the plaintiff's property; and in November, 1856, T. signed and gave another memorandum, whereby he undertook to forthwith assign all his estate and effects to the plaintiff, on behalf of himself and the rest of his creditors, but no assignment was ever made; but the plaintiff continued to employ the defendant at a salary in managing the business, and in completing the yacht, until the defendant left the premises, taking his household furniture with him, and having assigned his lease to the plaintiff; and the plaintiff then removed all the vessels, and employed another person to repair and look after them; and the vessels were shortly after seized in execution in an action for debt, brought against T. by S., and the Plaintiff claimed to be owner of the vessels, but an order for sale in default of payment was obtained from a judge in Chambers, whereupon a bill was filed; Vice-Chancellor Sir J. Stuart held, that whatever might have been the legal right of the plaintiff in the vessels before the execution, he had clearly established his right to relief in Equity (1). And it appearing that the defendant in the action had himself stated the amount of the debt to S., who was his sister-in-law, and that he had introduced her to his own legal adviser to act as her attorney in the action, and had suffered judgment to be entered up against himself without any defence, the Vice-Chancellor also held, that under these circumstances, although the debt appeared to have been a *bonâ fide* debt, the judgment was obtained by collusion between T. and S.; and relief was decreed accordingly, with costs to be paid by T. and S. (2).

The provisions of the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 504, part 9, limiting

6. The provisions of the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 504, part 9, limiting the liability of the owners of a ship coming into collision with another ship to the value of the former ship and its freight, do not extend to the case of a collision

(1) *Withall v. Truckwell*, 5 Jur. (N. S.) 929.

(2) *Ib.*

upon the high seas between two foreign ships, of which the owners are foreigners (1). Where, therefore, two foreign ships, of which the owners were foreigners, came into collision with each other upon the high seas, and the owners of the sunken ship recovered judgment in the Admiralty Court, whereupon the owners of the other ship filed a bill against the owners of the sunken ship for the purpose of restricting, under the provisions of the 17 & 18 Vict. c. 104, the liability of the owners of the former ship to the value of such ship and its freight, praying an injunction, and to have the value of their ship and her cargo ascertained; the Court dismissed with costs an appeal from the decision of Vice-Chancellor Sir W. P. Wood, allowing a demurrer to such a bill (2)—but *quære, per* Lord Justice Knight Bruce, whether the demurrer would have been allowed if one of the two ships had been British, or if the collision had taken place in a British river, or a British port? But, by Vice-Chancellor Wood, section 504 of the Act only applies to British ships held by British subjects, for acts done within the jurisdiction, and has no application where one of the two ships is a foreign vessel; and *prima facie*, and unless the contrary be expressed or be implied from the absolute necessity of the case, every legislature must be presumed to have intended by its enactments to regulate the rights which should subsist between its own subjects, and not to affect the rights of foreigners, whether by way of restricting or augmenting their natural rights; and the rules of the *lex fori*, where a question is raised between, or by, or against foreigners, are not to be applied to matters affecting the substance of the proceeding itself, but only to matters affecting the form of procedure (3); and the Vice-Chancellor, in allowing the demurrer, held, that in construing an Act of Parliament the Court is bound by the verbal construction of the section in question, if plain and simple, but if there is any doubt upon that, it is entitled to look, first, at the circumstances attending the passing of the Act; next, to the preamble; and lastly, to the whole purport and scope of the Act, beyond the section immediately under consideration (4).

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ing the liability of the owners of a ship coming into collision with another ship, do not extend to the case of two foreign ships, of foreign owners, upon the high seas.

7. The provisions of the 504th section of the 17 & 18 Vict. The 504th and 514th sections

(1) *Cope v. Doherty*, 4 K. & J. 367; 4 Jur. (N. S.) 451, 699; 27 L. J. (Ch.) 600.

(2) *Ib.*

(3) *Ib.*

(4) *Ib.*

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of the 17 & 18 Vict. c. 104, limiting liability and giving Chancery jurisdiction, are applicable notwithstanding the adverse claimant has obtained a definitive sentence in the Court of Admiralty condemning the ship; but the Court of Chancery has no control over the ship itself.

The value of a ship under the 17 & 18 Vict. c. 105, s. 504, under ordinary circumstances, and excepting a case where there is no market for the ship, will be taken to be what the ship would have fetched if sold immediately before her loss.

c. 104, limiting the liability of a shipowner to the value of his ship and freight, and the provisions of the 514th section, giving the Court of Chancery jurisdiction to stop actions and suits pending in any other Court in relation to the same subject matter, are applicable, notwithstanding the circumstances that the adverse claimant has obtained a definitive sentence or judgment of the Court of Admiralty condemning the ship; and the utmost to which the latter is entitled under such a judgment, in respect of the loss he has sustained, is to share rateably with the other claimants in the value of the ship and freight; but a Court of Equity has no control over the ship itself, and cannot prevent the party who has obtained such a judgment from proceeding to a sale of the ship, and retaining out of the proceeds such costs as he may be entitled to retain under the order of the Admiralty Court; subject, however, as above-mentioned, the shipowner is entitled to an injunction under the 514th section restraining the party who has obtained such a judgment from proceeding further in the Court of Admiralty (1).

8. The value of a ship, within the meaning of the Merchant Shipping Act (17 & 18 Vict. c. 105, s. 504), is not the value which the owner would have set upon his ship, nor is the sum for which the owner may have recently insured his ship the only criterion, although it is one of many criteria, of its value; but under ordinary circumstances, and with the exception of a case where there is no market for a ship of this kind, such value will be taken to be what the ship would have fetched if sold immediately before her loss (2), without deduction in respect of the costs of a sale (3); and, *semble*, in the excepted case, the Court would ascertain the price given for a ship, and the subsequent deterioration (4). And where ship-owners, being under a contract to replace their ship immediately, if lost, had insured her for £10,000, two months after which the ship was lost, Vice-Chancellor Sir W. P. Wood held, that they were not estopped from proving, in a suit instituted by them under the 514th section of the above Act, that the value of the ship at the time when she was lost did not exceed £5900; but in such a

(1) *Leycester v. Logan*, 4 K. & J. 446.

(3) *Leycester v. Logan*, 4 K. & J. 725.

(2) *African Steam Ship Company v. Swanzy*, 2 K. & J. 660.

(4) *African Steam Ship Company v. Swanzy*, 2 K. & J. 660.

suit, the Court has no power to give interest upon money ordered to be paid into Court (1).

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9. In a suit instituted by a shipowner under the 514th section of the Merchant Shipping Act to determine the amount of his liability in respect of the losses there mentioned, to have such amount distributed rateably amongst the several claimants, and to stop actions at Law in relation to the same subject matter, there being no adverse litigation amongst the claimants themselves, nor any other special circumstance occasioning an increase of costs, and over which the plaintiff has no control; the shipowner, as the party eased by the proceedings, must pay all the costs of all claimants whose claims are established, including the costs of actions at Law commenced by any of such claimants, but stayed by injunction in the suit (2).

Shipowner,
plaintiff under
s. 514 of Mer-
chant Ship-
ping Act, in a
suit to deter-
mine the
amount of his
liability in
respect of
losses, &c.,
must pay the
costs of all the
claimants.

10. In a suit to carry into effect an agreement by giving the plaintiffs relief in respect of a breach of the agreement by the defendants, and at the same time, on the ground of such breach, to remove them from an office of trust and confidence (ship's husbands) which they held by virtue of the agreement, and to appoint other persons to such office; the Court, considering the plaintiffs entitled on an interlocutory application to the relief sought, restrained the defendants, by interlocutory order in a supplemental suit, from prosecuting actions at Law against the plaintiffs under the agreement to recover damages for removing the defendants from such office (3).

11. In a question on the effect of a contract in the circumstances of the case, where the Court had concurrent jurisdiction with a Court of Law, and had assumed such jurisdiction by interfering to protect the rights of the parties; the Court restrained the parties to the contract from bringing actions at Law founded on the facts with regard to which the Court had interfered, and in which actions the same question, of the legal effect of the agreement, and in the circumstances, would necessarily arise (4). In this case the Court, on an interlocutory application, appointed a ship's husband, at the suit of some of the part owners of a ship as against the others, who were, under a contract, ship's husbands as well as part owners.

(1) *African Steam Ship Company v. Swanzy*, 2 K. & J. 660.

(2) *Ib.*

(3) *Brenan v. Preston*, 10 Hare 331; *vide* S. C. p. 410, *ante*.

(4) *Ib.*

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CHAPTER III.SECT. 9. *Judgments.*

The Court has jurisdiction to restrain execution on a judgment, on the ground of a subsequent release for a valuable consideration, and this, notwithstanding a rule to set aside the judgment on the ground of such release had been discharged, and an *auditâ querelâ* on the same ground had been set aside.

An executor who has confessed assets and pleaded according to the truth, is entitled to the protection of the Court when the assets are taken from him.

Equity will grant relief against a judgment which is against conscience, or obtained by fraud, &c.

1. The Court has jurisdiction in Equity to restrain an execution upon a judgment against a defendant at Law, on the ground of a subsequent release by the plaintiff at Law of his claims under the judgment for a valuable consideration paid by the defendant at Law; and this, notwithstanding that a rule obtained by the defendant at Law to set aside the judgment, on the ground of such subsequent release, had been discharged, and a writ of *auditâ querelâ* on the same ground had been set aside by the Court of Law (1).

2. Administration was granted of an estate, at the suit of a creditor, where a creditor had obtained judgment upon a plea of *plene administravit* by two of the executors, and a confession of assets to a certain amount by another executor, such assets consisting of money in the hands of bankers not reached by the execution, which the two executors prevented from being paid upon the cheque of the third executor to the judgment creditor. This money was afterwards paid into Court. Vice-Chancellor Sir J. Wigram, held, that an executor who, in an action at Law by a creditor of the testator, has pleaded according to the truth of the case is, when the assets are taken from him and administered in Equity, entitled to the protection of the Court against any personal liability under which he may be placed by the judgment against him (2).

3. The general rule is laid down that Equity will grant relief against a judgment which is against conscience, or the justice of which can be impeached by facts, or on grounds of which the party could not avail himself at Law, or of which he was prevented from availing himself by fraud, accident, mistake, or the act of the opposite party, without any negligence or fraud on his own part (3).

(1) *Williams v. Roberts*, 8 Hare, 315; *vide* S. C. p. 1018, *ante*.

(2) *Gaunt v. Taylor*, 2 Hare, 413, 419.

(3) *Kent v. Ricards*, 3 Md. Ch. Decis. 392; *Murnie & Co. v. Hodgey*, 7 Cranch, 332; *Lamb v. Anderson*, 1

Chand. 224; *Rowen v. Runnels*, 5 How. 134; *Moore v. Gamble*, 1 Stockt. 246; *Pollock v. Gilbert*, 16 Geo. 398; *Little v. Price*, 1 Md. Ch. Decis. 182 (Amr.); *Jarvis v. Chandler*, 1 T. & R. 319; *Ewel of Oxford's Case*, 1 Ch. Rep. 1; Toth. 126.

A judgment obtained by collusion will be relieved against (1). Special equitable grounds for the interference of the Court must be shewn (2). Equity will prevent the inequitable use of a good judgment (3). But it is said: "The general rule is, that this Court will not relieve against a judgment at Law on the ground of its being contrary to Equity, unless the defendant below was ignorant of the fact in question, pending the suit, or it could not have been received as a defence. There may be cases, perhaps, in which this general rule would be subject to some modification" (4). Negligence in setting up a defence at Law (5), or in suffering judgment to go against him (6), disentitles to relief in Equity.

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But there
must be no
negligence at
Law.

SECT. 10. *Executions.*

1. A judgment creditor acquires a right to the goods of the debtor by virtue of the writ of *fiery facias* from the teste of the writ, and therefore, in the case following, paramount to the right of the executor; thus where a creditor had recovered a judgment, and sued out a writ of *fiery facias* thereupon, in the lifetime of his debtor, and had placed the writ in the hands of the sheriff on the day after the debtor died; although a decree was afterwards made in the suit of an equitable mortgagee of certain parts of the real and personal estate of the debtor, against his devisee and executor, for the sale of the mortgage property, and if the proceeds of such sale should be insufficient to satisfy the plaintiff's debt then for an account and application of the general personal and real estate of the testator in a due course of administration; yet after this decree, the judgment creditor having levied under the *fiery facias* on goods left by the debtor, the Court refused the executor an injunction to restrain execution; and also on the ground that the

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| (1) <i>Isaac v. Humpage</i> , 1 Ves. J. 427; | (3) <i>Garlick v. McArthur</i> , 6 Wis. |
| <i>Bargate v. Shortridge</i> , 5 H. L. C. 297; | 450 (Amr.) |
| <i>Annesley v. Rookes</i> , 3 Mer. 226, n. | (4) <i>Lansing v. Eddy</i> , 1 John. Ch. |
| (2) <i>Rowe v. Wood</i> , 2 Sw. 234, n.; | 50; <i>Dunham v. Downer</i> , 31 Vern. 249 |
| <i>Protheroe v. Forman</i> , 2 Sw. 227; <i>O'Ma-</i> | (Amr.) |
| <i>hony v. Dickson</i> , 2 Sch. & Lef. 400; | (5) <i>Protheroe v. Forman</i> , 2 Sw. 227; |
| <i>Bateman v. Willoe</i> , 1 Sch. & Lef. 205. | <i>Bateman v. Willoe</i> , 1 Sch. & Lef. 205. |
| (6) <i>Williams v. Lee</i> , 3 Atk. 223; <i>Lansing v. Eddy</i> , 1 John. Ch. 50 (Amr.) | |

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decree for an account and administration of the general estate was not absolute, but conditional on the mortgage property proving insufficient to satisfy the plaintiff's demand (1).

2. In *O'Neil v. Browne* (2) the Court granted an injunction against proceedings on a judgment, granted after pretermittting the opportunity of pleading at Law; the neglect to do so having been accounted for by the creditor's solicitor having said that he would proceed no further if the lands were not subject to the judgment.

3. Although the Court has jurisdiction to grant an injunction to restrain an action at Law on the ground of legal as well as of equitable fraud, and to determine the legal fraud, yet it permitted an action to proceed in order to determine the question of legal fraud, and restrained execution only, with liberty to apply; but the jury having found that there was no legal fraud, this Court afterwards entered into the consideration of the question of equitable fraud, and finding none to exist permitted execution to be taken out (3).

4. Where the plaintiff, as surety, accepted bills indorsed by the principal debtor, which being dishonoured at maturity, the creditor, without the knowledge of the surety, drew accommodation bills on the debtor, which the creditor paid, and afterwards brought an action against the surety on the original bills, the Court, without considering whether the surety was discharged by those subsequent transactions, allowed the action to proceed, but stayed execution (4).

5. Where a decree had been obtained in a creditors' suit in April, 1844, and on the 25th of May following a judgment obtained by default, in April, 1843, by a creditor against an executrix, was set aside on the terms of the executrix pleading *plene administravit*; and on the 3rd of June, on the eve of the trial, the executrix moved for an injunction; the Court granted the same to stay execution only, and afterwards refused to allow the creditor to proceed against the executrix for the purpose of charging her personally (5).

(1) *Ranken v. Hurwood*, 5 Hare, 215; 2 Ph. 22.

(3) *Clarke v. Manning*, 7 Beav. 162.

(2) 9 Ir. Eq. Rep. 131.

(4) *Mackintosh v. Wyatt*, 3 Hare, 562.

(5) *Kirby v. Burton*, 8 Beav. 45.

6. A party against whom a verdict has been obtained at Law must pay the money recovered into Court before he can entitle himself to an injunction to stay execution, though he has since obtained a rule requiring the plaintiff to shew cause against a new trial (1).

7. The Court will not grant an injunction after a decree for the administration of assets without information of their state (2).

8. Notwithstanding a case made by bill, and answer, that the bill of exchange on which the action had been brought was given in consideration of defendant's delivering up a former bill which had been indorsed in consideration of a gaming debt, the Court refused an injunction to restrain the defendant from taking out execution on a judgment being suffered by default (3).

9. The Court will refuse an injunction to restrain the sheriff from executing a *fi. fa.* against furniture, &c., of the defendant at Law, which, with house, &c., had been let by him to plaintiff, who was in possession, unless a trust can be made out (4).

10. After a lapse of six or seven years the Court refused to restrain a creditor of an executor from taking in execution a lease of the testator's, which the executor had renewed in his own name for the executor's own debt, the creditor of the testator having stood by without putting in any claim, and having allowed all the other testator's debts to be paid, the creditor of the executor swearing that the lease had always been treated by the executor as his own (5).

11. Where by the terms of a railway contractor's contract the plant and materials brought by him upon the railway company's land were immediately to become the absolute property of the company, except that the contractor was to have the right of using them on the land for the purpose of the works; and if he should complete his contract the company were to give him, as part of his payment, the unconsumed materials; and if instead of the contractor the company should use the plant and materials, they would compensate him in respect of them; and the solicitors of the company had obtained a judgment against the company for

(1) *Austen v. Thomson*, 11 Price, 1.

(3) *Graves v. Houlditch*, 2 Price, 147.

(2) *Drewry v. Thacker*, 3 Sw. 546.

(4) *Garstin v. Asplin*, 1 Madd. 150.

(5) *Ray v. Ray*, Coop. 264.

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their costs, and issued execution, and the sheriff levied upon the plant and materials provided by the contractor; Vice-Chancellor Sir J. Stuart held, that the plant and materials were not, by the terms of the contract, so absolutely the property of the company as to be seizable by the sheriff under the execution issued by the company's solicitors (1).

12. Where an owner of coal and iron mines demised them to lessees (who afterwards sub-demised them to the defendant), with liberty and license to make and use such roads and ways in, over, and upon the premises as should be found necessary or expedient for carrying and conveying the coals and iron ore to be raised and landed, and for the commodious carrying on of the business of an ironmaster; and the lease contained a covenant on the part of the lessees at the end, expiration, or sooner determination of the term to yield up all ways and roads in, upon, or under the premises, in such good repair, order, state, and condition as that the coal and ironworks might be continued and carried on by the lessor, his heirs or assigns; and a creditor of the sub-lessee who had sued out an elegit claimed, under a sheriff's inquisition, the right to take up and remove the iron rails and tramways which had been put down upon iron tram-plates and wooden sleepers by the sub-lessee; the Court of Appeal held, reversing a decision of Vice-Chancellor Sir J. Stuart, that the iron rails and tramways were trade personal chattels of the sub-lessee, not affixed to the freehold, and therefore liable to be taken by the execution creditor, and dissolved an injunction against removing them (2).

13. Where a plaintiff had been unsuccessful in an action, and the defendant at Law was about to issue execution for the costs, and the plaintiff at Law filed a bill to restrain execution, the Lords Justices refused the injunction *ex parte*, unless upon the terms of the plaintiff bringing the amount of the taxed costs of the action into Court (3).

14. Where a judgment on a bond had been obtained, and

(1) *Beeston v. Marriott*, 4 Giff. 436; *vide* S. C. *sub. nom.* *Beaufort v. Bates*, 9 Jur. (N. S.) 960; *vide* S. C. p. 553, pp. 68, 356, *ante*.

(2) *Bates v. Beaufort (Duke)*, 3 De G. F. & J. 381; 8 Jur. (N. S.) 270;

(3) *Fisher v. Baldwin*, 22 L. J. (Ch.) 966.

nulla bona returned on a *fi. fa.*, and then the plaintiff brought a bill to have satisfaction out of stock standing in the name of trustees, and afterwards the plaintiff took the defendant on a *ca. sa.*, the Court dismissed the bill, as execution on a *ca. sa.* is satisfaction of the debt at Law, and Equity will not lend its assistance (1).

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15. In *Lee v. Park* (2) upon a motion to restrain a creditor after a decree from issuing execution upon a judgment obtained before the decree, the Master of the Rolls, Lord Langdale, said, "In the case of *Clarke v. Lord Ormonde* (3) Lord Eldon is reported to have said that even if a creditor has got a judgment before a decree, though he may come in and prove as such, he must not take out execution, and in reference to the conduct of the parties, and perhaps to the nature of the claim, there may be such cases; but such is not the ordinary rule, and in this particular case, having regard" to its circumstances, he thought that the motion ought to be refused with costs.

16. In *Warner v. Paine* (4) it is held that where mortgaged personal property is delivered to the mortgagee, and there is a continued change of possession, the mortgagee is not entitled to an injunction to restrain a subsequent execution against the mortgagor, as he has a perfect remedy at Law.

17. In the same case it is held that an injunction will not be granted to restrain a party from selling, on an execution against a mortgagor, personal property mortgaged to the complainant to secure an antecedent debt, where the execution was issued, although not actually levied, prior to the execution of the mortgage.

SECT. 11. *Mortgage of Chattels Personal.*

1. In *Neighbour v. Brown* (5) legatees who had mortgaged their interest in a legacy were restrained, in 1857, from prosecuting a suit in the County Court to obtain payment from the executors,

(1) *Horn v. Horn*, Amb. 79.

(5) 26 L. J. (Ch.) 670. By the 28

(2) 1 Keen, 714, 724; *vide* S. C. & 29 Vict. c. 99, limited jurisdiction in p. 706, *ante*.

Equity is conferred on the County Courts.

(3) Jac. 108.

(4) 3 Barb. Ch. 630 (Amr.)

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SECT. 11.

the plaintiffs alleging want of jurisdiction to deal with the questions involved.

2. Where B., as a security for money advanced, agreed to assign certain chattels to C., and B. became unwell, and C. thereupon took possession of the chattels, and B., upon recovering his health, confirmed the possession, but no assignment was ever executed, and subsequently B. became bankrupt; the Court held, that there had been a legal delivery of the chattels, and that the assignees were not entitled to proceed with an action for their recovery (1).

SECT. 12. *Trover.*

The Court of
Chancery will
never permit
its decisions
to be ques-
tioned in a
Court of Law.

1. The Court of Chancery exercises a discretion in permitting actions to proceed, but it will never permit its decisions to be questioned in a Court of Law; therefore where an action of trover was brought against a sheriff for an ejectment under a writ of assistance, issued in pursuance of an order of the Court of Chancery, an injunction was granted restraining further proceedings in such action, although the action also sought damages for a trespass by the sheriff in taking chattels not included in the order (2).

(1) *Piercy v. Humphreys*, *Piercy v. Nowle*, 15 L. T. (N. S.) 345.

(2) *Walker v. Micklethwait*, 1 Dr. & Sm. 49.

CHAPTER IV.

INCIDENTS OF PROPERTY (REAL AND PERSONAL).

SECT. 1. *Account.*

PART II.

1. The Common Law Procedure Act, 1854, has not taken away the jurisdiction of the Court to restrain actions involving complicated questions of account, when the accounts can be more conveniently taken in Equity, and even since that Act accounts cannot be taken before an arbitrator at Common Law so conveniently as in a Court of Equity; and where there have been complicated transactions, and questions of difficulty are likely to arise in taking the accounts, a Court of Equity will still grant an injunction to restrain proceedings at Law. And where a plaintiff at Law gives notice of an intention to move for a reference, *semble*, this alone is sufficient ground for a Court of Equity to assume jurisdiction over the matter, and restrain the action, a reference at Common Law being necessarily a more imperfect method of taking accounts than that furnished by the practice in Equity; and an injunction was granted by Vice-Chancellor Sir W. P. Wood accordingly (1).

2. The jurisdiction of the Courts of Law and Equity with respect to complicated accounts is so far concurrent that when parties have elected to proceed at Law, a Court of Equity will not stay such proceedings simply on the ground that it could more conveniently dispose of the suit; nor would a Court of Equity refuse its aid, when invoked, because a Court of Law could completely settle the whole of the disputed accounts (2).

A Court of Equity will not refuse its aid, because a Court of Law can completely settle the whole of the disputed accounts.

3. Where the plaintiffs were a steam-packet company, con-

(1) *Croskey v. European and American Steam Shipping Company*, *Oakford v. Sume*, 1 J. & H. 108; 6 Jur.

(N. S.) 1190.

(2) *Scott v. Liverpool (Corporation)*, 5 Jur. (N. S.) 105; 3 De G. & J. 358.

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stituted as a *société anonyme* under the laws of Sardinia, on whose behalf the defendant, as their broker and agent, had effected policies; and the company had instituted proceedings in a competent Court in Genoa against the defendant for an account, to which suit he had appeared, but before final decree in the foreign Court he had commenced an action in England against the insurers upon one of the policies, and, as alleged by the bill, intended to apply the policy moneys in satisfaction of the alleged debt which he pretended to be due from the company, but which debt the company denied, and was prepared to prove that the defendant was largely indebted to them on the result of the accounts being taken in the said suit in Genoa, and prayed (*inter alia*) a declaration that the amounts to be recovered on the policy by the defendant as agent of the plaintiffs were the plaintiff's moneys; Vice-Chancellor Sir W. P. Wood held, on demurrer, that it was competent for the company to file a bill to restrain the action, and to have a receiver of the policy moneys pending the foreign litigation (1).

4. On a bill for an account of transactions under a contract, and for an injunction, the Court refused to restrain execution on a judgment for costs of an action which the plaintiff had brought against the defendant, to recover moneys alleged to be due under the same contract, and in which action there was a verdict for the defendant (2); but in *Wilson v. Wetherherd* (3), after a decree to account had been made, an injunction was granted on the application of the defendant to restrain the plaintiff from proceeding at Law in an action commenced by him pending the suit in Equity; and in *Mocher v. Reed* (4) an injunction was granted against an action commenced by the plaintiff while proceeding under a decree to account for the same matter, it being a contempt to proceed at Law after the subject of the cause had been attached in Court.

5. Where A., a clothier, and B., a dyer, had mutual dealings in the way of their trade, which were carried on several years without payment of money on either side, and B. died intestate, and

(1) *Transatlantic Company v. Pietroni*, Joh. 604.

(2) *Fisher v. Baldwin*, 11 Hare, 352.

(3) 2 Mer. 406.

(4) 1 B. & B. 318.

indebted to others by specialties, who, as principal creditors, took out administration to his estate, and sued A. at Law ; the action was restrained, and an account ordered, and A. was to be allowed by way of discount what was due to him from B. (1).

6. On the ground that the plaintiff had elected to proceed in Equity, and had got the relief prayed for, and that the subject matter of the actions was the same as in the suit, the Court granted an injunction to restrain actions for tithes which had accrued since the decree for an account, and pending the taking of the report (2).

7. Where accounts between a servant and agent and principal cannot be opened, and must be considered as settled, the question raised by the principal of damages and salary being a legal one, a bill for an account cannot be maintained. And where a servant and agent, who had been in the habit of rendering accounts from time to time of his receipts and expenses, which were duly entered in the books of his principals and settled, having left their service, brought an action against them for salary, and they thereupon filed a bill for an account, claiming also damages, and denying that the salary was due ; the Court refused an injunction to restrain the action (3).

8. *Seemle*, a bill will lie for an account by an author against his publisher, where the publisher refuses altogether to render any account ; but where a publisher rendered an account, and brought an action for the balance due to him ; in the absence of fraud or misstatement the Court would not allow a suit by the author for an account to go on, but left the matter to be determined at Law, and allowed a demurrer to the bill for want of equity (4). There is no rule that an author may not file a bill for an account against his publisher ; but in simple cases, which can be dealt with by a Court of Law, the Court will not assume jurisdiction, or interfere with an action to recover a balance of account (5).

9. The bare relation of principal and agent does not entitle the

(1) *Dowman v. Matthews*, Prec. Ch. 580.

(2) *Thorpe v. Mattingley*, 2 Y. & C. 421 ; 8 L. J. (N.S.) Ex. Eq. 9.

(3) *Hunter v. Belcher*, 10 Jur. (N. S.) 663.

(4) *Barry v. Stevens*, 31 Beav. 258.

(5) *Id.* 31 L. J. (Ch.) 785.

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SECT. 1.

principal to come into Equity for an account, if the matter can be fairly tried at Law (1)

10. Where a bill was filed alleging that the defendant had been employed by the plaintiff in the purchase of horses, and stating that accounts were unsettled; that the plaintiff had taken possession of some of the horses; and that an action in trover had been brought by the defendant, and praying for relief under the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42, s. 1), which makes it obligatory on the Court of Chancery to decide all questions of law or fact on the determination of which the title to relief or remedy in Equity depends (*et vide* s. 4); a motion for an injunction to restrain the action was refused by Vice-Chancellor Sir J. Stuart, with costs, on the ground that where an action has commenced to determine a legal right the Court will not, upon a bill filed after the action commenced, asking relief, the title to which is dependent on the legal right, assume, as of course, exclusive jurisdiction under the above Act, and restrain the proceedings in the action (2).

11. Where a bill was filed by a solicitor against a person employed as his occasional clerk, and in that character receiving and paying moneys for him, and claiming against him a sum for services, the master having paid from time to time moneys to and for the clerk; and the bill prayed an injunction to restrain an action brought by the clerk for the balance of the account, Vice-Chancellor Sir R. T. Kindersley held, that this was not such an account as to require the interference of Equity, and refused an injunction (3).

12. Where in an action at Law the defendant pleaded equitable pleas of set-off, to which the plaintiff replied, and the defendant then filed his bill for an account and injunction, stating the same case as that made by the pleas, claiming a balance, and alleging that the accounts were very complicated; Vice-Chancellor Sir R. T. Kindersley held that the pleas, having been replied to, must be taken to shew a good defence at Law, and the account being such as could be taken at Law, refused an injunction (4).

(1) *Barry v. Stevens*, 31 Beav. 258.

(3) *Fluker v. Taylor*, 3 Drew. 183.

(2) *Curlewis v. Carter*, 9 Jur. (N. S.)

(4) *Welchman v. Farebrother*, 1 Jur.

1148; 33 L. J. (Ch.) (N. S.) 370.

(N. S.) 126.

13. An account signed and settled by the plaintiff in Equity, leaving a balance in favour of the defendant in Equity, is sufficient ground to refuse an injunction to restrain the defendant's proceedings at Law, though there have been subsequent dealings, if the plaintiff has refused to come to a settlement (1).

14. In a suit by a patentee for infringement of his patent the Court may (under 21 & 22 Vict. c. 27), decree at the same time an injunction, an account, and an inquiry as to damages (2).

SECT. 2. *Set-off*.

1. Where there are cross demands between two parties of such a nature that if both were recoverable at Law they would be the subject of legal set-off, then if Equity has jurisdiction of the subject matter it will enforce the set-off (3).

2. A cross demand accrued after verdict is no ground for an injunction to stay proceedings on a verdict (4).

3. If a party defendant has a personal demand against the plaintiff, who had been decreed entitled to a charge of greater amount on the defendant's estate, and that party has got a judgment against the plaintiff, he will be restrained from issuing execution (5).

4. Where the set-off is merely legal, no injunction to restrain proceedings at Law will be granted; as where a landlord proceeded at Law for rent, and the bill prayed an injunction on the ground of an agreement under which the landlord was more than the amount of rent indebted to the tenant, the Court refused the injunction (6). The Vice-Chancellor, Sir J. Leach, said: "The tenant here claims to set off a legal demand against the distress of his landlord for rent. The policy of the Law does not permit a set-off against a distress for rent; and a Court of Equity must

(1) *Hirst v. Peirse*, 4 Price, 339.

(4) *Whyte v. O'Brien*, 1 S. & S. 551.

(2) *Betts v. Neilson*, 16 W. R. 524;

(5) *Austin v. Tynte*, 2 Moll. 486.

37 L. J. (Ch.) 321; 18 L. T. (N. S.) 159.

(6) *Townrow v. Benson*, 3 Madd. 203, 209.

(3) *Clark v. Cort*, Cr. & P. 154.

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If the subjects are matter of set-off, and capable of proof at Law, the Court will not restrain an action.

follow the Law, and cannot relieve against the rule of Law where the claim to set off is founded on a legal demand. It is not necessary to consider how the case might be if the tenant had a counter demand, not at Law, but in Equity." And so where the subjects in dispute are matter of set-off and capable of proof at Law, as in *Dinwiddie v. Bailey* (1)—in which Lord Eldon observed that this case might be disposed of altogether at Law, though it was another question whether the jurisdiction of this Court might not attach upon this case—the Court will not restrain an action. And upon a bill being filed by an insurance broker for a discovery and account of money paid and received by him in that capacity on account of the defendant, and money due to him for a commission, &c., and for promissory notes indorsed to him, and to restrain an action as brought contrary to the universal custom of the business, the Court allowed a demurrer to the bill (2).

5. Where an action for trespass for mesne profits is brought against a party who has a cross claim against the plaintiff at Law for money expended on the land, the Court will grant an injunction to restrain the proceedings at Law, there being no right of set-off in such an action. Thus where an agent had permitted his principal to expend money on an estate, which the agent afterwards claimed as his own, and to which his real representative established a legal title by ejectment, the Court granted an injunction to restrain an action brought by the agent's representative for mesne profits (3).

A tenant cannot restrain proceedings upon a replevin bond, on the ground of set-off against the rent distrained for.

6. A bill will not lie by a tenant against his landlord to restrain proceedings upon a replevin bond, on the ground of set-off against the rent distrained for. And where a defendant, with his mother's money, purchased leaseholds, which were assigned to him, and subsequently, at her request, covenanted to hold them upon trust for her for life, and afterwards for himself and two others; and he afterwards reassigned them to his mother, who sub-let them to the plaintiff, and the mother received the rents from the sub-lease during her lifetime; and on her death the plaintiff, in ignorance of the real nature of the lessor's title, paid the rent to her executrix; and disputes arose between the persons interested

(1) 6 Ves. 136.

(2) *Ib.*

(3) *Cumford (Lord) v. Lewis*, 1 V. & C. 427; *vide* S. C. p. 491, *ante*.

under the settlement, and a suit was instituted, in the course of which the defendant was declared to be a trustee of the leaseholds upon the trusts of the settlement; and the defendant subsequently brought ejectment against the plaintiff and failed in it, but succeeded in a replevin; and the plaintiff then filed his bill for a declaration that the plaintiff was entitled to set off the costs due to him in the action of ejectment, in which he had been successful, against the defendant in Equity, and other items, against rent due from him to the defendant; the bill was held demurrable for want of equity; and Vice-Chancellor Sir R. T. Kindersley said the effect of the plaintiff's bill was to insist that "he had a right to a declaration of this Court that a private debt due from a trustee might be set off against a debt owing to a trustee in his character of trustee," a proposition which, he said, was totally untenable (1).

A private debt due from a trustee cannot be set off against a debt owing to a trustee in his character of trustee.

7. Where a tenant had obtained judgment in an action against his landlord for excessive distress for a certain sum, and the landlord subsequently had had awarded to him for damages, under an arbitration clause in the lease, a larger sum, and the tenant took proceedings to enforce payment on the judgment; upon a bill by the landlord the Court refused with costs an injunction to restrain such proceedings on the ground of set-off (2).

8. A bill in Equity cannot be maintained to restrain the collection of an execution in favour of the assignee of an insolvent debtor, on the mere ground that the plaintiff has claims against the debtor which might be the subject of set-off; there being no averment to shew that the plaintiff, for any reason, could not have availed himself of his right of set-off in the action in which the judgment was recovered (3).

9. An action on a forthcoming bond was enjoined at the instance of the surety therein, on the ground that he had a debt of larger amount against the plaintiff, and that the latter was insolvent (4).

10. Where A. borrowed money from B., arising from the sale of his wife's real estate, and gave a bond therefor payable to the wife, and on the husband's death the wife brought a suit on the bond

(1) *Pratt v. Keith*, 33 L. J. (Ch.) 528.

(2) *Maw v. Ulyatt*, 7 Jur. (N S.) 1300.

(3) *Wolcott v. Jones*, 4 Allen, 367 (Amr.)

(4) *McClellan v. Kinnaird*, 6 Gratt. 352 (Amr.)

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against A., who filed an account of sets-off consisting of the dealings of B. with A.'s firm, and alleged an agreement that such dealings should be set-off against the bond; and this plea was waived, and judgment had for the plaintiff, and the defendant then filed a bill praying an injunction against the judgment; it was held, that if the defendant had any defence it was a legal one, which having failed to make, with no excuse, he could have no relief in Equity. And this, although A. was also B.'s executor, and in that capacity was not a party to the previous suit (1).

SECT. 3. *Mistake.*

Where there is such a mistake in an agreement as to render it null and void, the Court will order it to be delivered up to be cancelled.

1. Where there is such a mistake in an agreement as to render it null and void, the Court will order it to be delivered up to be cancelled. And where P., in August, 1861, agreed to purchase a house and premises of L., supposing that he, L. was seised, in fee, but he subsequently discovered that L. possessed only an agreement from B. for a lease for a short term, of which five years and a half were unexpired, with an option of purchase; and P. agreed to purchase, for £2500, "the benefit of L.'s agreement with his lessor," and he covenanted to perform all L.'s covenants in the agreement for a lease, and L. admitted that this contract was erroneous; and it was subsequently discovered that B. had not a freehold title to more than three-fourths of the property, and P. consequently refused to complete his purchase; and L. brought an action against P. to recover £500, the declaration stating that the plaintiff in the action sought to recover £500 only under the first count, £2500 having been inserted in the agreement by mistake for £500; and P. thereupon instituted a suit in Equity to have the agreement set aside and the action stayed; Lord Justices Knight Bruce and Turner held, affirming a decision of Sir J. Stuart, that the mistake in the agreement rendered it void, and ordered the defendant to pay the costs of the suit and action (2).

(1) *Perkins v. Clements*, 1 P. & H. (Va.) 141.

(2) *Price v. Ley*, 9 Jur. (N.S.) 295; 11 W. R. 475.

SECT. 4. *Fraud—Misrepresentation.*PART II.
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1. Upon an action being brought by an architect against his employers for his commission, a bill was filed charging the defendant to be their agent, suggesting fraud on the part of the architect in taking gratuities from tradesmen, &c., and praying an account of the dealings and transactions of the defendant in respect of the particular works on which he had been engaged, and of the sums he was entitled to charge as commission, and an injunction to restrain the action; but the Court dissolved the common injunction which had been obtained to stay proceedings at Law in the action, on the ground that the matter was as fit for the decision of a jury as for that of a Court of Equity, and that the Courts of Equity and Common Law had in this case concurrent jurisdiction; and that the Court of Common Law had been set in motion in the first instance, though, probably, this case was most fit to be the subject of arbitration, which a Court of Common Law could direct if it thought it necessary. But Lord Chief Baron Abinger agreed that if the bill had been filed in the first instance, and the Court had obtained jurisdiction over the fund and the account, he should have prevented the defendant bringing his action afterwards; but the mere existence of cross demands is not sufficient ground to restrain an action already commenced on an account stated (1).

The mere existence of cross demands is not sufficient ground to restrain an action already commenced on an account stated.

2. Where the owner of an embarrassed estate had executed a bond and warrant of attorney to confess judgment thereon, to his sister, with the intention of having judgment for a large sum entered in her name, and proceedings taken so as to secure to himself a portion of the rents of his estate, and protect them from creditors who were proceeding to get into possession; and a judgment was afterwards entered by the attorney of the obligor, the latter retaining the bond in his possession; but no further proceedings were taken on the judgment, as the creditors succeeded in extending the portion of the property sought to be protected from their demands; and the judgment was assigned, and the assignee proceeded at Law against the conusor, an injunction for want of

(1) *Norris v. Day*, 4 Y. & C. 475.

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answer having been obtained ; on a motion after answer to continue it, the Court held, that although the attempt was ineffectual, the transaction was such a fraudulent contrivance to delay creditors as to prevent the Court from interfering, and the injunction was dissolved (1).

3. Where defendant, on a treaty of marriage by the plaintiff with the daughter of one of the other plaintiffs, had represented to the agent of the other plaintiffs that there was no such demand as that sued upon existing, the Court granted an injunction to restrain the defendant from recovering the demand (2).

4. Where a remainderman in tail had acquiesced and encouraged the next of kin in remainder for life, without impeachment, &c., to cut timber upon leave given by a jointress, the remainderman was restrained by a perpetual injunction from bringing any action of waste against the jointress (3).

5. Where a plaintiff having been induced by his solicitor to execute a deed as absolute purchaser of an estate, on the understanding that he was acting as trustee for another person, and the real purchaser was afterwards induced by the same solicitor to execute a mortgage of the property to the defendant ; and the deed contained a fictitious recital of an agreement for a loan from the defendant to the plaintiff, and a fictitious receipt of the mortgage money by the Plaintiff from the defendant ; and it also contained a covenant on behalf of the plaintiff to pay the mortgage debt to the defendant ; and afterwards, the security becoming doubtful, the defendant pressed the plaintiff for payment of interest, to which he answered that he had executed the deed as a mere trustee, and under the impression that he was to be freed from all pecuniary liability ; and thereupon the defendant sued the plaintiff on his covenant, and the plaintiff filed a bill for an injunction ; and it turned out that the plaintiff's solicitor, being the defendant's debtor, and pressed by the defendant for further security, had offered the defendant the estate of his client, the plaintiff, as a security, so that the plaintiff was a necessary party to the mortgage, the solicitor being the real borrower ; although the plaintiff had been guilty of a mis-

(1) *Bulman v. Ramsay*, Sau. & Sc. 159.

(2) *Neville v. Wilkinson*, 1 Bro. C. C. 543.

(3) *Aston v. Aston*, 1 Ves. Sen. 396.

representation in the recitals and frame of the mortgage deed, yet, as the defendant had been equally guilty of misrepresentation (no money having passed), one misrepresentation might be set off against the other; and the Court held that plaintiff was entitled to an injunction to restrain the action (1).

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One misrepresentation by plaintiff set off against another by

defendant, and plaintiff entitled (here) to restrain an action

A solicitor acting for himself and the vendor will be restrained proceeding on an absolute covenant for title inserted by him with actual or constructive notice of a defective title.

6. A solicitor acting on behalf of both parties (himself and the plaintiff) who prepares a conveyance, in this case a lease to himself, containing an absolute covenant for title on the part of the vendor, when he knows, or must be taken to have known, that his title was defective, will be restrained by a perpetual injunction from proceeding with an action on the covenant. Vice-Chancellor Chatterton said, that "an absolute covenant for title exposes the covenantor to an action, without any previous disturbance being occasioned to the tenant; whereas in the case of covenant for quiet enjoyment the tenant must be actually disturbed before he can bring an action. The solicitor must have known that he had no right to ask the plaintiff to enter into such covenant; therefore, on the question of actual fraud, without making any further special imputation on the defendant, I must hold that he was guilty of fraud by reason of concealment, which concealment was the means of his obtaining this covenant. This alone would, in my opinion, disentitle the defendant to enforce this covenant." As to the fiduciary relation, he said: "The relation of solicitor and client carries with it all its consequences, whether it arise from an already existing relation, or be only created for the purpose of a particular transaction;" but that "if the relation does not exist previously, and is first established in the particular transaction, it must be definitely established, and is not necessarily to be inferred" (2).

7. Where, by misrepresentation, an Act of Assembly (U. S.) had been obtained, whereby lands previously sold in accordance with a former Act were included in a new grant, it was decreed that the second grantee should release such land to the State by deed, and an ejectment against the claimant under the first Act was enjoined (3).

(1) *Greenfield v. Edwards*, 11 L. T. (N. S.) 663. (2) *Williamson v. Moriarty*, 19 W. R. 818 (Ir.)

(3) *The State v. Reed*, 4 Har. & M^cHen. 6 (Amr.)

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8. Where A. having sued B. on a promissory note, it appeared that the consideration for the note was an undertaking on the part of A. that C. should convey land to B., which A. alleged that C. owned, and for which, on the conveyance being made, B. made to A. a cash payment in addition to the note, fully covering the value of all C.'s interest in the land—which was but three-fifths of what A. had represented it to be ; it was held that the suit should be enjoined, without any offer on the part of B. to rescind the sale (1).

SECT. 5. *Notice.*

A party employing the same solicitor to recover a debt, as employed by another creditor in a suit for administration, has constructive notice of the decree, and his action will be restrained.

1. Where a party employed the same solicitor to bring an action for an alleged debt against the personal representative of an intestate as another creditor had employed to obtain the usual decree in a creditor's suit against the same parties ; the Court held, that the party bringing the action must be considered as having received notice of such decree, and granted an injunction, without costs, to restrain him from proceeding with his action (2).

SECT. 6. *Trusts.*

1. In *Portugal (King of) v. Russell* (3), Vice-Chancellor Sir J. Stuart held, that a bill stating that the plaintiff had deposited moneys as security against a disputed claim, on trust that if the claimant should within one month bring and diligently prosecute an action, then to satisfy the amount recovered, otherwise on trust for the plaintiff ; and that the claimant had brought the action and obtained a nominal verdict, with leave to the defendant to move to set aside the verdict, which was afterwards turned into a special case, not yet determined ; and stating that the action had not been duly and diligently prosecuted with effect, and asking for return of the deposit, was not demurrable ; the Vice-Chancellor said, that “upon the true construction of the declaration of trust must depend the question whether the plaintiff or the defendant is

(1) *Warren v. Carey*, 5 Ind. 319 (Amr.)

(2) *Clough v. French*, 6 Jur. 636.

(3) 3 Giff. 287.

entitled to the fund in its entirety, or in certain proportions ;” and that the bill was one to which a demurrer could not be maintained.

2. Trustees of money for an unascertained class of individuals cannot be called upon to ascertain, at their own risk and expense, who is included in that class ; and, therefore, where an agent of a foreign railway company deposited with the plaintiffs, who were bankers in England, certain bonds of the company, and a sum of £5000 to guarantee the payment of the interest on the same bonds, which was payable at the plaintiff's bank ; and in case of non-payment of the interest the £5000 was to be forfeited and divided among the bondholders, and the interest had not been duly paid ; one who claimed to be an unsatisfied bondholder, and had in that character commenced an action against the plaintiffs for part of the £5000, was restrained by Vice-Chancellor Sir W. P. Wood (1) ; and, *semble*, the trust was so clear in its creation that the £5000 might, in that respect, have been brought into Court under the Trustee Relief Act, 1847 (2).

An unsatisfied bondholder restrained (here) proceeding at Law to recover a part of a sum deposited in trust for an unascertained

class of bondholders. The trustees cannot be called upon at their own risk to ascertain who is included in the class.

SECT. 7. *Partnership.*

1. The lien of the representatives of a deceased partner, in respect of a debt due by the partnership, attaches only to the specific partnership property existing at the date of the dissolution, and does not extend to any property acquired by the surviving partner after the dissolution of the partnership (3). In this case a bill was filed by the executors of a deceased partner to restrain an action brought against the executors by the assignees in bankruptcy of the surviving partner, to recover all that the plaintiffs, the executors, had received in respect of the partnership assets, under a deed of trust assigning all the partnership assets (to which additions had been made in continuing the business after the death of the deceased partner), to the executors, and executed by the surviving partner for the purpose of enabling the executors

The lien of the representatives of a deceased partner, in respect of a debt due by the partnership, attaches only to the specific property existing at the date of dissolution.

(1) *Hankey v. Morley*, 4 Jur. (N. S.) 234.

(3) *Payn v. Hornby*, 4 Jur. (N. S.) 446 ; 27 L. J. (N. S.) 689.

(2) *Ib.*

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A separate creditor of one partner cannot hold the partnership effects taken under an execution for his separate debt, against the partnership creditors.

to pay off the debt due to their testator, and accounts were directed by the decree on the above principle.

2. A separate creditor of one partner cannot hold the partnership effects, taken under an execution, for his separate debt, against the partnership creditors (1); such a creditor has no right against the joint property farther than the separate interest of that partner, viz., his share upon a division of the surplus, subject to the accounts of the partnership (2). In analogy with this rule, where a creditor of a firm agreed that he would not press his claims at maturity if each partner would give his own indorsed note for half the amount; and A., one partner, having complied with the condition, but B., the other, not having done so, a suit was brought against the firm; it was held, that A. was entitled to an injunction to restrain such suit until his note should be delivered up to him (3).

SECT. 8. *Bankruptcy.*

Equity will not restrain proceedings upon a verdict obtained through defendant's neglect to produce his certificate.

1. Equity will not restrain by injunction further proceedings at Law upon a verdict obtained through the defendant's neglect to produce his certificate in evidence (4).

2. In *Flower v. Herbert* (5) an injunction was granted until the hearing of the cause to restrain an action by a bankrupt against the assignees under his commission, upon the ground of his long acquiescence (a year and a half) under the commission.

3. In *Ex parte Grant* (6) an injunction was granted by the Court of Bankruptcy to restrain an action of ejectment brought by a bankrupt, at the instigation of the petitioning creditor and another creditor, to recover the possession of premises sold under a commission acquiesced in for seven years. And in *Ex parte Davy, In re Chambers* (7) it was held that the Court of Bankruptcy had jurisdiction to restrain the bankrupt from bringing actions to upset his commission; and after twenty-two years, and acquiescence, this Court would have restrained the bankrupt from

(1) *Taylor v. Fields*, 4 Ves. 396.

(2) *Ib.*

(3) *Childs v. Horr*, 1 Clark, 432

(Amr.)

(6) Buck. 90.

(4) *Lingard v. Hibbertson*, 1 Rose, 459.

(5) 2 Ves. Sen. 326.

(7) 1 Mont. & A. 283.

bringing actions against purchasers under the commission; and it was further held that this Court had power to stay any action brought by the bankrupt in any Court (1). In *Ex parte Elliott v. Jermy* (2), an injunction, which was afterwards made perpetual, was granted to restrain the assignees from bringing an action at Law to recover £49 from a party who, by consent of the bankrupt, before the choice of assignees, and as a partial indemnity for £78, which he had paid to remove a distress from the bankrupt's premises, had retained the above sum of £49, which was produced by a sale of the bankrupt's goods.

4. Lord Chancellor Clare said, in *Assignees of Gardiner v. Shannon* (3), that he should always restrain an action brought for a dividend as contravening the bankrupt laws. He said: "Such actions, I know, have been maintained; but whatever may be the decisions of Courts of Law on the subject, I think it is the duty of the Great Seal not to permit them. The administration of the effects is vested in the Great Seal; and the creditor coming in to prove his debts submits to that authority. There may, indeed, be a case, when an action may be permitted: for instance, if it were necessary to give the creditor the benefit of a personal remedy against an assignee who had wasted the effects; but then it must be under the control of the Court." Where, on a general construction of a deed of inspectorship, it was held that the intention of the parties was to deal with each other as if the matter were in bankruptcy, and a creditor who held a policy proved for and received dividends on his whole debt and retained his policy, Vice-Chancellor Sir R. T. Kindersley held that he was not entitled to do so, and that he could not be allowed to sue the debtor for breach of covenant in not paying further premiums, and granted a perpetual injunction to restrain an action on the policy (4). The Vice-Chancellor said, that "having a security which was of no value, the defendant made his election to prove for the whole debt, and having done this, his security, had it been of any value, would have been the property of the other creditors."

(1) 1 Mont. & A. 290.

(3) 2 Sch. & Lef. 229.

(2) 3 Mont. & A. 110, 664; 3 Dea. 313; 2 Dea. 179.

(4) *Kingsford v. Swinford*, 4 Drew. 705.

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The Court will restrain an action of ejectment against, or disturbing, a devisee in whose favour a verdict has been given, in which a copy of the will was received in evidence, and the will, according to the copy, established by this Court.

1. A bill being filed by a devisee of lands who was in possession, for the purpose of establishing a copy of a will which had been abstracted, against the defendant, the heir at law, but raising no case implicating the heir in the abstraction, was retained for a year; and the result of an action, in which the copy of the will had been received in evidence, having been in favour of the plaintiff, the Court, by its decree, established the will upon and according to the copy, and restrained the defendant from bringing any ejectment, or disturbing the plaintiff in the enjoyment of the lands devised to him (1).

SECT. 10. *Interpleader.*

The Interpleader Act, &c., apply only where the opposite claims depend on legal rights, and this Court will restrain proceedings at Law directed by a Common Law judge, where one of the claimants has an equitable demand as mortgagee.

1. The Interpleader Act, 1 & 2 Will. 4, c. 58, and the 1 & 2 Vict. c. 45 ("An Act to extend the Jurisdiction of the Judges of the Superior Courts of Common Law"), apply only to those cases where the opposite claims of both parties depend on legal rights, and not on matters peculiarly of equitable jurisdiction. And where an order had been granted by a Common Law judge in a case where one of the claimants had an equitable demand as mortgagee, that is to say, claiming under a deed assigning a ship then on a voyage, and cargo, &c., by way of security for moneys; and the assignment had been produced to the proper officer of the port of London, and registered, but was not indorsed on her register, the ship being on her voyage; the sheriff of Surrey having seized the ship and cargo under a writ of execution sued out of the Queen's Bench by H., one of the defendants, a judgment creditor of the owner of the ship, an injunction was granted at his suit to restrain proceedings in an issue at Law directed by a judge of the Court of Queen's Bench under the order of interpleader (2).

Though the claims of the principal defendant are legal, if the claims of the other defendant are equitable only, and derived from the principal defendant, yet the Court will restrain legal proceedings on an interpleader bill.

2. In a case of interpleader, though the claim of the principal defendant is legal, and the claims of the other defendant are equitable only, and derived from the principal defendant, yet the Court will restrain legal proceedings on an interpleader bill.

(1) *Davies v. Evans*, 4 De G. & Sm. 440.

(2) *Langton v. Horton*, 3 Beav. 464; *vide* S. C. p. 414, *ante*.

derived from him, and equitable only, and do not extend to the whole amount recovered at Law, yet an injunction restraining legal proceedings may be obtained on an interpleader bill (1).

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3. Where one of the defendants to a bill of interpleader is suing the plaintiff in Equity and another is suing him at Law, the Court will grant an injunction to restrain the suit in Equity as well as the action at Law (2). The Court will on a bill of interpleader restrain a suit in Equity by one defendant and an action by another.

4. Where two parties claimed a real estate under different wills, the validity of which were in controversy, and an action had been brought against the tenant by one of the claimants; upon his filing a bill of interpleader against both claimants he obtained an injunction on bringing his rent into Court; and the Court afterwards directed an issue to determine the rights of the defendants, and continued the injunction on the tenant continuing to pay his rent into Court (3). The Court will on a bill of interpleader by a tenant, and payment of rent into Court, restrain an action by one of two claimants.

5. Where one of the defendants to a bill of interpleader insists that the effect of some act of the plaintiff is to deprive him, as against that defendant, of the right, which he would otherwise have, to treat the case as one of interpleader, the Court will not, on that account, refuse an injunction, unless it be satisfied either that the act relied on has the effect which the defendant attributes to it, or at least the question whether it has that effect or not is a real and substantial question to be tried; and, therefore, where a tenant filed a bill of interpleader against two sets of persons who claimed to be respectively devisees and co-heirs of his original landlord, and injunction was granted by the Master of the Rolls, Lord Langdale (whose decision was affirmed by Lord Cottingham), to stay proceedings at Law by one of the parties for the recovery of rent, on payment of the rent due into Court, although it appeared that the plaintiff had, by a memorandum in writing, acknowledged the title of that party, and paid rent to him for nearly two years after the original landlord's death, such acknowledgment and payment appearing to have been made in ignorance of his title being disputed (4). But although a stakeholder who has entered into a new contract, binding at law, with one of the rival claimants of the

(1) *Hamilton v. Marks*, 5 De G. & Sm. 638.

(2) *Crawford v. Fisher*, 10 Sim. 479.

(3) *Townley v. Deare*, 3 Beav. 213.

(4) *Jew v. Wood*, 1 Cr. & P. 185; 3 Beav. 579.

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same demand, cannot maintain an interpleader suit; yet if such contract was obtained by misrepresentation the Court will grant an injunction to restrain actions commenced against him by both claimants. And where a bank deposit receipt to M. had been obtained by a misrepresentation that E. (one of the two original depositors of the money, M. being the other) was a widow, it was held that the bank was entitled to an injunction to stay actions brought separately by the husband of E. and by M., against the bank for the money (1).

To support an interpleader suit there must be conflicting claims.

6. In order to support an interpleader suit there must be conflicting claims. Therefore, where a reversion subject to a lease for years was devised, and the heir at law of the testator did not claim the rent, although there was a question whether the devise was not void for remoteness, a petition of interpleader by the tenant was dismissed with costs as against the heir at law. But in the same case, A., and B. a married woman, and her husband C., being entitled to the reversion and rent reserved by the lease, A.'s title being to one moiety; but a question had arisen between B. and C. on a settlement, whether B. was entitled to the other moiety to her separate use, and A., B., and C., had brought an ejectment for nonpayment of rent, upon the lessee filing the above-named petition of interpleader; it was held, that the petition should be dismissed as against A.; and *semble*, if several are entitled to the rent, and all concur in demanding it, though there be conflicting claims between them, the tenant cannot maintain an interpleader suit (2).

7. A judgment had been obtained by A. against the plaintiffs, who on the same day had received notice that A. had assigned his debt to B. A short time afterwards the plaintiffs were served with an attachment issuing out of the Lord Mayor's Court, at the suit of C., attaching all moneys of A. in their hands. The plaintiffs informed B. of the proceedings, but he refused to give any guarantie, and left the plaintiffs to take their own course, and judgment was obtained against them as garnishees. The plaintiffs thereupon filed a bill of interpleader against the several parties, to which A. and B. demurred; but Vice-Chancellor Sir W. P. Wood overruled the demurrer, and held that although the attachment in

(1) *Costello v. Martin*, 1 Ir. R. Eq. 50. (2) *Elliott v. Kempston*, 15 Ir. Ch. Rep. 120.

the Lord Mayor's Court might be inoperative while the judgment remained unsatisfied, the plaintiffs ought not to be put to expense in defending proceedings in which they had no interest; and the Lord Chancellor, Lord Westbury, affirmed the decision, and held that the defendant could not upon demurrer, upon an allegation in the bill that the judgment was duly recovered against the garnishee in the Lord Mayor's Court, contend that the money recovered in a superior Court of Law was not attachable by process out of the Lord Mayor's Court (1).

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8. A tenant cannot sustain a bill of interpleader against his landlord unless the title is affected by some act done by the landlord subsequently to the lease (2). And where mortgagees by deed, by the direction and with the consent of W., demised, and W., in exercise of a power contained in his marriage settlement of 1829, granted, demised, and confirmed, a messuage at a yearly rent; and C., the lessee, covenanted to pay the rent to W., unless it should be demanded by the mortgagees; and it was provided that until the mortgagees served C. with notice to pay the rent to them, the receipt of W. should be a good discharge; and the lease gave notice to C. of, but did not recite, the settlement; and R., the surviving trustee of the settlement, gave notice to the administrator of C. not to pay the rent to any person except himself; and subsequently thereto W. also gave the administrator notice not to pay the rent (none of which had been paid since 1857) to R.; and W. had commenced an action against the administrator, and R. threatened to do the same; whereupon he filed a bill against R. and W. praying that they might be directed to interplead, and on a former occasion the arrears of rent had been ordered to be paid into Court; the Court held that this was a case in which the tenant was not entitled to maintain a bill of interpleader, and directed the repayment of the money in Court to the administrator (3).

A tenant cannot sustain a bill of interpleader against his landlord, unless the title is affected by some act by the landlord subsequently to the lease.

9. Where a merchant at Nantes had contracted with a London firm for a supply of coal, and the London firm had contracted with B., another London house, to supply the goods, which the latter

(1) *Nelson v. Barter*, 10 Jur. (N. S.) 832; 33 L. J. (Ch.) 705.

(2) *Cook v. Rosslyn (Earl)*, 1 Giff. 167.

(3) 1b.

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did, and delivered the same to the Nantes merchant; and the firm B., who shipped the goods, had brought an action for the amount against the Nantes merchant in December, and had arrested one of the firm who was then in London, and upon putting in bail he had quitted England, and with his partner remained at Nantes until after the action was tried; and on the 13th of February their attorney, by inadvertence, not being instructed to defend the action, a verdict was taken by default; and on the 16th of April they had moved for a new trial, which was refused, but having obtained leave to file an interpleader bill against the original London firm, and against the firm B., which brought the action, they moved for an injunction to restrain the plaintiffs in the action from issuing execution on the judgment, and from taking out of the Court of Queen's Bench the amount which the Nantes merchant had paid in, as a term of staying execution; Lords Justices Knight Bruce and Turner, affirming a decision of the Master of the Rolls, Sir J. Romilly, refused the injunction on the ground that the time which had been allowed to elapse before filing the bill was a bar to the application (1); and, *per* Lord Justice Turner, such a bill will not lie, being in the nature of and substantially a bill for a new trial, the only point at issue being whether the plaintiff was a debtor at law to B., which it had been decided at Law that he was (2).

Laches in filing a bill of interpleader is a bar to the application.

Courts of Equity and Common Law, have concurrent jurisdiction in interpleader. But a Court of Equity first resorted to will not refuse to entertain a bill of interpleader.

10. Courts of Equity and Common Law have concurrent jurisdiction in interpleader, but a Court of Equity, if first resorted to, will not refuse to entertain a bill of interpleader, although a Court of Law might be resorted to on the facts stated in the bill. And where S. & Co. of Calcutta, in February, 1856, had consigned merchandize to S. W. & Co., their London correspondents, and drew bills of exchange upon them for the amount, and the Oriental Bank agents at Calcutta negotiated the bills of exchange upon the same, and the bills of lading being indorsed to them, and also upon having letters of hypothecation executed by S. & Co. to the effect that they should on default being made in payment at maturity sell the goods, and apply the proceeds in payment of the bills of exchange and costs and charges, the balance, if any, to be placed against other bills which might be in the hands of the

(1) *Larabrie v. Brown*, 1 De G. & J. 204; 26 L. J. (Ch.) 605.

(2) *Ib.*

bank, or otherwise to be at the disposal of S. & Co.; and in April, 1856, S. W. & Co. had become bankrupt; and in July, 1856, the bank received notice from C., on behalf of S. & Co. of Calcutta, not to deliver to S. W. & Co. goods attached to the bills, or documents representing them; and the bank also, in July, 1856, had received notice from S. W. & Co. not to sell any produce the documents for which the bank held as security for payment of bills drawn upon S. W. & Co., until such bills had reached maturity, or consent given for the sale thereof, and the bills had been duly presented by the bank and dishonoured; and subsequently thereto the bank, under the power of sale given to them, had sold the goods and paid themselves out of the proceeds; and after such sale and payment there remained in their hands a balance, which payment was claimed by S. & C., and by the assignees of S. W. & Co., and proceedings at Law had been commenced or threatened by each party; upon a bill filed by the Oriental Bank, praying that the claimant of the fund might be directed to interplead, to which S. & Co. demurred, on the ground that there being an actual contract between the bank and S. & Co. the case was not one for interpleader; Vice-Chancellor Sir J. Stuart held, that the fund being liable to a claim on the part of the assignees of S. W. & Co., arising from the transactions and acts of S. & Co. with the bankrupts, this was a case of interpleader, and overruled the demurrer (1). But in *Myers v. United, &c., Guarantee Life Assurance Company* (2), where after an award in an action by depositors of a policy against an insurance company the company received notice of an assignment by the plaintiffs of all their property, together with a demand by the assignees for payment of the money recovered in the action; Lord Justice Turner said he very much doubted whether this was properly a case for interpleader, since he thought the money might have been safely paid to Messrs. A. & P. as the attorneys in the action; that the money was, however, paid into Court, and that the suit might be said to have been adopted by all parties, and that it was then too late to take that objection; that he thought, therefore, the plaintiffs in that suit should have their costs.

(1) *Oriental Bank Corporation v. Nicholson, Same v. Calrow*, 3 Jur. (N. S.) 857.

(2) 7 De G. M. & G. 112.

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11. Where a life insurance company had received notice of an assignment by an insurer of a policy which the company had granted, and the insurer afterwards became insolvent; and soon after the death of the person whose life was insured the assignee for value applied for payment of the sum due upon the policy, and the company inquired of the provisional assignee of the insolvent whether he would consent to payment being made to the assignee for value; and the provisional assignee said he could not give such consent, but that it must be sought for from the Court of Insolvent Debtors; and the insolvent himself gave notice to the company not to pay over the policy moneys to his assignee for value, on the ground that the debt for which it was assigned as a security was satisfied; and in the meantime an action was brought upon the policy by the assignee for value in the name of the insolvent against the company; the Court held, that it was not a case in which the company was entitled to file a bill of interpleader against the plaintiff in the action, the insolvent, and his provisional assignee; the insolvent having no title, and the title of his provisional assignee being subordinate to that of the assignee for value (1); overruling the case of *Fenn v. Edmonds* (2), which was a case where an insurance company was held entitled to file a bill of interpleader against the plaintiff (assignee of the policy) in an action on the policy, in the name of the assignor (who after the assignment had become bankrupt), and against the company and the bankrupt's assignees in bankruptcy.

12. Where under a *fi. fa.* obtained by A. in Chancery the goods of B. were seized by the sheriff, and advertised for sale, and B. then became bankrupt, and thereupon the sheriff received notice from the official assignee in the bankruptcy of the adjudication, and not to remove or sell the goods; and shortly afterwards the sheriff was ordered to make a return to the writ, and accordingly the sale took place; and subsequently the sheriff filed an interpleader bill against A., the execution creditor, and the assignee in bankruptcy, alleging that both were threatening proceedings against him for the amount; Vice-Chancellor Sir J. Stuart held that the sheriff was entitled to file in Equity a bill of interpleader against the assignee and the execution creditor, and that the assignee was, on

(1) *Desborough v. Harris*, 5 De G. M. & G. 439.

(2) 5 Hare, 314.

interpleader, entitled to the proceeds of the sale, and that the sheriff was entitled to his costs (1). But in *Dalton v. Furness* (2) it was held that a sheriff who has seized goods under a *fi. fa.* issuing out of Chancery, which are claimed by a third party, cannot file a bill of interpleader until he has given notice to the judgment creditor of the adverse claims to the goods seized.

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SECT. 11. *Discovery, Bill of, in aid of Action at Law.*

1. The Court will not allow a contest on affidavits on a motion for an injunction to restrain an action until the defendant has given the full discovery required of him for the purpose of determining whether the plaintiff in Equity should have a discovery or not; the fact being admitted in this case on the one side that the plaintiffs knew nothing at all about the matter, that ignorance inducing them to come to the Court for discovery; and on the other side the defendant must have known all the facts; and the 15 & 16 Vict. c. 86, s. 58, has not put an end to the right to a discovery in aid of the defence to an action at Law; and it was not intended by the Legislature that the plaintiff's right to a discovery was a matter to be determined on affidavit on the motion for the injunction to restrain the action until discovery (3).

The Court will not allow a contest on affidavits, on a motion for an injunction to restrain an action until the defendant has given discovery.

2. If a defendant fail in proving a material fact at Law, of which he afterwards obtains a discovery from the adverse party in Equity, it is a ground for granting an injunction, though he would not be permitted to prove the fact by any other witnesses whom he could have examined at Law (4).

A defendant having failed in proving a material fact at Law, of which he afterwards obtains a discovery from the adverse party in Equity, is entitled to an injunction.

(1) *Child v. Mann*, L. R. 3 Eq. 806;
16 L. T. (N. S.) 49.

(2) 35 Beav. 461.

(3) *Harris v. Collett*, 26 Beav. 222.

(4) *Hankey v. Vernon*, 2 Cox, 12.

SECT. 12. *Actions—Proceedings at Law—Auditâ querelâ—Verdicts
Judgments—Sentences—Interdicts.*

1. Where a defendant has at Law an equitable defence, he is not compelled to plead it, but may proceed in Equity to restrain the plaintiff from his action (1).

2. A bill to set aside, on the ground of fraudulent representation, an order in an action at Law made by consent, staying the action and directing the payment of a certain sum of money by the defendant to the plaintiff, which sum the plaintiff afterwards accepted, was held to be demurrable, as it did not state that the plaintiff was ignorant of the alleged representation being fraudulent, not only at the time of the order, but at the time he received the money (2). And it appearing that a second action had been brought by the plaintiff, and had been stayed by the Court of Law, in consequence of the consent order made in the first action, and that the plaintiff had taken regular proceedings at Law to set aside the order staying the second action, but that that order had been sustained; this Court refused to aid a suit in Equity brought by the plaintiff, by giving him leave to amend upon allowing the demurrer to his bill (3).

3. Where a petition was filed against the public officer and several directors of a joint stock bank, who all resided out of the jurisdiction, for a discovery in aid of a defence to an action at Law by the public officer against the plaintiff, and for an injunction to restrain the action; the Court refused the injunction, because the directors were not parties to the record at Law, and an admission by them would not be evidence against the plaintiff at Law (4). But, *semble*, the residence of the directors abroad, and the want of power to compel a discovery from them, would be sufficient ground for refusing the injunction (5).

4. The Court will restrain an action brought after the decree upon the subject matter referred to the Master, and pending the proceedings in his office (6).

The Court
will restrain
action after
a decree upon
a subject
matter
referred.

(1) *Kingsford v. Swinford*, 5 Jur.
(N. S.) 261; *Gompertz v. Pooley*, 4
Drew. 448.

(3) *Ib.*

(4) *Hendrie v. Thompson*, 1 Ir. Ch.
Rep. 278.

(2) *Dunn v. Cox*, 11 Hare, 61.

(5) *Ib.*

(6) *Frank v. Basnett*, 2 My. & K. 618.

5. In *Drummond v. Pigou* (1) a special injunction was granted, under the circumstances, to stay process of outlawry and all further proceedings at Law against the plaintiff; plaintiff in Equity to give judgment in the action, with stay of execution, to be dealt with as the Court should thereafter direct.

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An injunction granted (here) to stay process of outlawry.

6. Where A. and B. had jointly confessed a judgment to C. for £400, and afterwards had filed a bill against him to set it aside as unfairly obtained, and for an injunction, and in the meantime C. having got an order for time, the injunction issued of course; but on putting in his answer, he moved to dissolve the injunction, and being told it was dissolved, he took B. in execution upon the judgment, but being afterwards informed that the plaintiff, by filing exceptions to his answer, had continued the injunction, he immediately discharged B. out of custody. The judgment being joint, it was insisted that the discharge of one from the execution operated at Law as a discharge of both; and therefore A. and B. brought an *auditá querelâ* in the King's Bench to be relieved against the judgment upon the ground of such discharge; but on a bill filed by C. the Court decreed him the whole £400, with his costs both at Law and in Equity, and ordered a perpetual injunction to stay all proceedings on the *auditá querelâ* (2).

The Court restrained proceedings on an *auditá querelâ* to be relieved from a judgment on the ground of a discharge from custody.

7. After five several trials at bar, in actions of ejectment by the plaintiff at Law, and the verdicts all the same way for the plaintiff in Equity, the Court of Chancery will grant a perpetual injunction to restrain all further proceedings at Law by the plaintiff at Law (3).

The Court will restrain proceedings at Law in ejectment after five trials with verdicts for the plaintiff in Equity.

8. After judgment suffered by default, the plaintiff at Law proceeding to assess damages under a writ of inquiry, an injunction will not be extended to stay trial (4).

9. The prosecution of an action by surveyors against a railway company for a large balance was not restrained in a case where the bill filed by the company sought a discovery as to documents

Injunction refused to stay proceedings in an action, though plaintiff sought discovery, there having been delay.

(1) 2 My. & K. 168.

Ch. 261; Gilb. Eq. Rep. 2; 4 Bro. P. C.

(2) *Clerke v. Moore*, 4 Bro. P. C. 723.

373; *et vide ante*, p. 1087, pl. 37.

(4) *Monteira v. Bannister*, 3 L. J.

(3) *Bath (Lord) v. Sherwin*, Prec.

(Ch.) 177.

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in order for the defence, but the injunction had not been applied for till more than a year after the action (1).

The Court will stay an action for damages for an arrest under an irregular writ of *ne exeat regno*.

10. An injunction will be granted to stay an action at Law for damages for an arrest under an irregular writ of *ne exeat regno* issued from Chancery, and compensation for the injury done will be refused at the same time by the Court, or ordered only on a proper case being made therefor (2).

Commissioners for the examination of witnesses restrained proceeding in an action for their fees on the ground that they are officers of the Court.

11. In *Blundell v. Gladstone* (3) the Court, upon motion by the plaintiff's solicitor in the cause, restrained the plaintiff's commissioners for the examination of witnesses in the cause from proceeding in an action for their fees, as such commissioners, against the solicitor; and referred it to the Master to ascertain what was due to them. And so, in *Ambrose v. Dunmow Union* (4), the Master of the Rolls observing that such commissioners were officers of the Court, that they had a right to a proper remuneration, and if there was any dispute as to the amount it must be settled by the Taxing Master.

The Court will restrain actions against officers of the Court for irregularities in executing its process.

12. Where an irregularity has been committed by an officer of the Court in executing its process, the Court will not permit a party to proceed in an action at Law against its officer, but will refer it to the Master (and now to Chambers), in a proper case, to settle a compensation; and where the officer of the Court omitted to bring the defendant to the bar within the time required by the 1 Will. 4, c. 36, 5th rule, in consequence of his being in ill health, the Court, from the circumstances, it appearing impossible to make out a case for damages, granted a motion, with costs, for an injunction to stay proceedings in an action brought by the defendant against the officer for the irregular detention (5).

A party arrested by irregular process of the Court, should apply to the Court for a reference to settle compensation, or for liberty to bring an action.

13. Where a party is arrested by virtue of the process of this Court, which turns out to be irregular, he may apply to the Court, either for a reference to the Master (and now to Chambers) to settle a proper compensation, or for liberty to bring an action. And therefore where the plaintiff, arrested under an attachment sued out by

(1) *South Eastern Railw. Co. v. Martin*, 1 H. & T. 69; 2 Ph. 758; vide S. C. pp. 484, 901, *ante*.

(2) *Darley v. Nicholson*, 2 D. & War. 86.

(3) 9 Sim. 455; *et vide In re Weaver*, 2 My. & Cr. 441; vide S. C. p. 1231, *post*.

(4) 8 Beav. 43.

(5) *Chalie v. Pickering*, 1 Keen, 749.

the defendant, which was afterwards set aside for irregularity, brought an action for false imprisonment against the defendants, the Court restrained the action and referred it to the Master to settle a proper compensation (1). And in *Phillips v. Worth* (2), where defendants, who had been imprisoned under an attachment, which was afterwards set aside for irregularity, commenced actions against the plaintiffs to recover damages for false imprisonment, the Court stayed the actions on the terms of the plaintiffs paying to the defendants their costs at Law, and of their application to stay, and directed a reference with respect to a proper compensation for the injury which the defendants had suffered.

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14. Where an action at Law had been brought by a creditor against an administrator, and the defendant, by mistake of his attorney, pleaded a false plea, and a verdict was given for the plaintiff, though the merits were never tried, yet Equity would not relieve (3).

15. Prohibition lies not to an inferior court after the defendant has pleaded there; for by pleading the defendant submits to the jurisdiction; but at the suit of the king prohibition lies, though the defendant has pleaded. But if a prohibition has been granted the Court will grant a supersedeas, if there is an affidavit that the cause arose within the jurisdiction (4).

Prohibition does not lie to an inferior Court, after a defendant has pleaded there, unless at the suit of the king.

16. In *Blacoe v. Wilkinson* (5) the Lord Chancellor, upon the party moving declining to give security for costs, refused an injunction to stay trial just at the instant of the trial at the assizes.

17. Where A., being seised in fee, by articles previous to marriage agreed within six months to convey in such manner that he should take an estate for life, remainder to his first, &c., sons in tail male, reversion in fee in himself; and the marriage took effect, but the settlement was never executed; and A. afterwards confessed judgments, which were entered before the registration of the articles; and on his death B., who was the only issue male, took the legal fee, and, being tenant in tail in equity, reversion in fee,

(1) *Bricknell v. Stamford*, 1 Beav. 368. (3) *Stephenson v. Wilson*, 2 Vern. 325.

(2) 2 Russ. & My. 633.

(4) *Anon.*, 1 Vern. 301.

(5) 13 Ves. 454.

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levied a fine, and declared the uses previous to marriage, to provide a jointure, and for the issue of the marriage, subject to a life estate in himself; and the cognizee of the judgments revived them by *scire facias* against B., who had no defence at Law; and B. afterwards made payments on account, and promised to pay the balance; on a bill by B., and the other parties taking an interest under B.'s settlement, to restrain the judgment creditor, and to be relieved against them, the Court held, that no merger took place, the equitable estate tail not merging by accession of the legal fee, and that the judgment in *scire facias* had no operation (1). And upon a case stated, to obtain the opinion of the Court of King's Bench touching the construction of the Registry Act, 6 Ann. c. 2, the Court held, that a deed of marriage settlement limiting lands was a valid deed in respect to the estates therein limited against the judgment debts of the settlor, confessed by him subsequent to the deed, notwithstanding the non-registry of the deed previous to the confession of the judgments (2).

18. An injunction against proceeding at Law extends to prevent a suit against the sheriffs for not paying over money levied in the original suit before the injunction issued (3).

19. A Court of Equity has jurisdiction by injunction to restrain further breaches of a covenant, where the party, covenantee, has been compelled repeatedly to resort to Law to such an extent as to become vexatious (4).

20. Where A. and B. had entered into a contract, and a dispute having arisen, B. commenced an action in respect of a portion of the contract; and A. filed a bill for specific performance, and moved to restrain the action; the Court held, that B. could not, after having commenced an action on the contract, set up in Equity the defence of an alleged previous waiver of it (5).

21. In *Causton v. City Offices Company (Limited)* (6), a demurrer which had been allowed by Vice-Chancellor Sir J. Stuart, for want

(1) *Broune v. Blake*, 1 Moll. 368, 302; 2 Hov. Sup. to Ves. 454; *et vide* S. C. p. 83, n., *ante*.
620.

(2) *Ib.*

(3) *Bolt v. Stanway*, 2 Anstr. 556.

(4) *Waters v. T aylor*, 2 V. & B.

(5) *Whitaker v. Fox*, 13 L. T.

(N. S.) 588.

(6) 12 Jur. (N. S.) 497; 14 W. R. 999.

of equity, to a bill filed to restrain an action for damages brought by the equitable owner of land, under a contract for sale, in the name of the legal owners in fee simple, was overruled by Lords Justices Knight Bruce and Turner. Lord Justice Turner expressing some doubt. The plaintiff in the bill alleged that the want of repair in the premises was caused by works carried on by the equitable owner on adjoining premises; but that he, the plaintiff, had no defence to the action, because it was commenced in the name of the legal owner.

22. If a defendant in an action pleads an equitable plea, he cannot come for an injunction to restrain the action upon the same ground which is the subject of the plea, provided the Court of Law can give such relief as a Court of Equity will give (1). But if it cannot, then the equitable plea is no bar to the defendant coming to a Court of Equity, subject, however, to the costs of the plea being controlled by the Court of Equity (2). *Primâ facie*, a defendant, by pleading an equitable plea, thereby makes his election of the tribunal in which his case is to be tried; but if the case is such that the Court of Law cannot give full relief, then his having pleaded an equitable plea is no bar to his coming into Equity. And where, to an action by B. against W. for damages for the obstruction of his light and air, by increasing the height of a party wall between his premises and those of W., W. pleaded, by way of equitable plea, an alleged agreement on the part of B. to allow the wall to be raised on the terms of his not being called upon by W. to contribute to the expense, according to the Metropolitan Building Act, under which notice of the contemplated alteration had been given, and of his having a better skylight put up for him by W.; on a bill filed by W. for specific performance of the agreement, and motion made to restrain the action, Vice-Chancellor Sir R. T. Kindersley held, that, inasmuch as this was a case in which a Court of Law could not give relief in respect of the agreement, the equitable plea did not preclude W. from coming into Equity; and that W. was entitled to the injunction upon certain terms (3).

If a defendant plead an equitable plea to an action, he cannot restrain the action on the same ground, if the Court of Law can give the same relief as a Court of Equity; but if it cannot, then the equitable plea is no bar to a suit in Equity.

23. Where a defendant has not, within a reasonable time, put in

(1) *Waterlow v. Bacon*, L. R. 2 Eq. (N. S.) 614; *vide* S. C. p. 1045, *ante*.
514; 35 L. J. (Ch.) 643; 12 Jur. (2) *Ib*.

(3) *Ib*.

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The assignee of a mortgagee stands in the same position as the mortgagee. The mortgage debt cannot be severed from the security, and pending a suit to redeem an action on a collateral security was restrained.

his answer to a bill charging fraud against him, he cannot resist an injunction to restrain him from proceeding in his action (1).

24. The assignee of a mortgagee cannot stand in any different character, or hold any different position, from that of the mortgagee himself; although, as in this case, the mortgagor may not have been a party to the assignment. Every mortgagor has the right to have a reconveyance of the mortgaged property upon payment of the money due upon the mortgage; and the mortgagee is charged with the duty of making such reconveyance upon such payment being made; therefore, where a mortgagee, having, besides the property mortgaged, certain promissory notes made by the mortgagor, as collateral security for his debt, transferred the mortgage without assigning the collateral securities; on a motion to dissolve an *ex parte* injunction which had been granted by the Supreme Court (Equity side) of New South Wales to restrain a mortgagee from proceeding at Law upon certain promissory notes pending a suit by the mortgagor to redeem and settle the equities of the parties; the Privy Council held, without finally deciding the question, that as in this case the debt and security had been improperly severed, although it was not necessary to say that in no case could the mortgage debt be severed from the security for that debt, nor was it even necessary for the Privy Council to say that, in this particular case, the debt and security could not be severed, yet it was sufficient if there were a question upon the point proper to be determined upon the hearing of the cause, and that the injunction in the Court below had been properly granted (2).

25. Although in *Sewell v. Freeston* (3), after verdict in an action upon a bill filed, suggesting matter in the defendant's knowledge, which the plaintiff could not prove at the trial, a plea of verdict was allowed; and in *Taylor v. Sheppard* (4) it was held that a bill in Equity to set aside a verdict was not sustainable where the facts on which the bill was founded, though discovered since the trial, might have been established at the trial upon cross-

(1) *Peninsular, West Indian, and Southern Bank (Limited) v. Darthez*, 14 W. R. 454.

(2) *Walker v. Jones*, L. R. 1 P. C. 50; *vide* S. C., p. 200, *ante*.

(3) 1 Ch. Ca. 65 (and that a verdict

might at one time have been pleaded to a bill to set aside the verdict, see also *Lee v. Boles*, 2 Ch. Ca. 95; *Shuter v. Gilliard*, *Ibid.* 250; *Armsted v. Parker*, Rep. t. Finch, 171.)

(4) 1 Y. & C. 271.

examination; yet, as it is said in *Williams v. Lee* (1), there are cases in which Equity will relieve against verdicts; as where the plaintiff knew the fact of his own knowledge to be otherwise than what the jury found, and defendant was ignorant of it at the trial; but where a defendant submits to try it at Law first, when he might by bill of discovery have come at the fact from plaintiff's answer on oath, before such trial was had, the Court will not always relieve against a verdict; and allowing the damages to be excessive, the defendant at Law ought to have applied to the Court where the cause was tried, and moved for a new trial on that account. And in an *Anonymous Case* (2), where upon a bill to be relieved against an action the defendant pleaded a verdict and judgment, and the plaintiff on petition got an order that the bill should be taken as filed before the trial, and the plea set aside, with leave for the defendant to plead, answer, or demur *de novo*, and the defendant pleaded the same matter again, and that he had no notice of the bill, nor was served with process until after the verdict; yet he was ordered to answer.

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26. The Privy Council set aside an interdict obtained by D. and E. from the Supreme Court, against a transfer of lands in the colony of Natal, on the allegation that previously to the sale to A., B. had sold the lands to them, D. and E., and that A. had notice of such previous sale—on the ground that the judgment in the suit by D. and E. against A. was not admissible in evidence in a suit instituted by C. against D. and E. and A. to set aside the interdict, and enforce a provisional sentence obtained by him, C., in a suit in the nature of a foreclosure suit; the said judgment being, so far as respected C., *res inter alios acta*, and binding only on the parties to that suit, and that in the absence of any evidence of fraud in the original transfer between A. and B. the interdict obtained by D. and E. could not be sustained (3).

An interdict obtained in one suit, set aside in another, on the ground that the judgment or interdict was *res inter alios acta*, and binding only on the parties to the suit in which the interdict was obtained.

27. Where the plaintiff gave a warranty deed of lands, upon which, with the knowledge of the grantee, the defendant, a railroad had acquired a permanent easement for their track, and for gravel, &c.; and the parties agreed to divide the damages which

(1) 3 Atk. 224.

(2) 3 Ch. Rep. 25.

(3) *The Natal Land and Coloniza-*

tion Company v. Good, L. R. 2 P. C.

121; 16 W. R. 1086; 5 Moo. P. C. C.

(N. S.) 132.

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the company should pay in certain proportions; and that the defendant should make no claim on his covenants; and he having commenced an action upon the covenants, the plaintiff filed a bill for an injunction; it was held, that the defendant should be enjoined not only from prosecuting the suit, but also from using that deed and its covenants as evidence for the purpose of enforcing such claim (1).

28. Where land has been laid out in town lots, or otherwise divided among many occupants, who are threatened with numerous suits, a bill in Equity lies to quiet the title, and enjoin a suit at Law for a particular fractional part, although the complainants have a legal title, and therefore an adequate remedy at Law in each particular case. The object of such bill is to relieve the title from the embarrassment of the adverse claims, and also to restrain a multiplicity of suits (2).

SECT. 13. *Damages.*

The smallness of the damages recovered will not prevent the interference of the Court; but an interlocutory injunction will be refused where there is evidence of acquiescence.

1. The smallness of damages recovered in an action will not prevent the Court from interfering, and the Court will not on that ground compel other actions to be brought; but where there is evidence of acquiescence the Court will not interfere on a motion for an interlocutory injunction (3).

SECT. 14. *Foreign Attachment—Lord Mayor's Court of City of London—Garnishee Order.*

A foreign attachment only affects money for which the debtor could maintain an action.

1. A foreign attachment can only affect moneys for which the debtor himself could maintain an action at the time of the attachment; and an attachment of the produce of the sale of a commission in the army, in the hands of the army agents, was held ineffectual as against the lien and right of set-off of such agents, and as against a prior equitable assignment (4). This was a suit

(1) *Taylor v. Gilman*, 25 Vt. 411 (Amr.)

(2) *Crews v. Burcham*, 1 Black. 352 (Amr.); see *Woodruff v. Fisher*, 17 Barb. 224 (Amr.)

(3) *Rochdale Canal Company v. King*, 2 Sim. (N.S.) 78; vide S. C. pp. 10, 14, ante.

(4) *Webster v. Webster*, 31 Beav. 393.

by an equitable assignee of the produce of the sale of the commission against a creditor of the assignor who had obtained the attachment, the assignor and the army agents (the garnishees) praying a declaration of the plaintiff's right to the proceeds of the commission, and for an injunction (1).

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SECT. 15. *Arbitration—Awards.*

1. The Court will, under circumstances, grant an injunction to restrain proceeding in an arbitration (2), as it did in this case, where the principle of the motion was that it went upon the notion of the arbitration being a part execution of an agreement, which the bill struck at the root of.

The Court will, under circumstances, restrain proceedings in an arbitration, as (here)

where the bill struck at the root of an agreement of which the arbitration was a part.

2. Where a proviso is binding, and plainly intended to be part of a security for the debt, and in no way in the nature of a penalty, the Court will refuse an injunction to restrain an action brought for the amount due; so held, in *Sterne v. Beck* (3), by Lords Justices Knight Bruce and Turner, overruling a decision of Vice-Chancellor Sir J. Stuart, where, by an award, the plaintiff had been ordered to pay money by instalments to the defendant, and had made default; and the plaintiff and defendant then entered into an agreement by which the former was to pay the debt by different instalments, and that, in the event of default being made in any one of these payments, all that remained due in respect of the debt should be at once recoverable; and default was made, and the defendant brought an action for the whole sum.

Where a proviso is binding, and plainly intended to be part of a security, and in no way in the nature of a penalty, the Court will not restrain an action for the amount due.

3. The Court of Chancery has no jurisdiction to set aside an award made under a reference of an action, whether the same is or is not under the 9 & 10 Will. 3, c. 15. And where A., having brought an action against B., and B. a cross action against A., the same and all matters in difference were, by a judge's order, by consent, referred, and B. died pending the reference; and before administration could be taken out the arbitrator, notwithstanding

This Court has no jurisdiction to set aside an award made under a reference of an action.

- (1) *Webster v. Webster*, 31 Beav. 394. (Ch.) 682; 11 W. R. 587; 8 L. T.
(2) *Myline v. Dickinson*, Coop. 195. (N. S.) 344.
(3) 1 De G. J. & S. 595; 32 L. J.

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a protest, proceeded *ex parte*, and made an award directing payment of a sum of money and costs to A.; and A. had filed a creditor's bill for the administration of B.'s estate, founded upon the debt under the award; the Court held that a bill would not lie by B.'s executor to dismiss the creditor's suit, declare the award void, and grant an injunction to restrain proceedings for enforcing the same (1).

Where authority to make an award has been conferred upon commissioners by an Act, this Court has no jurisdiction, by way of appeal to set it aside.

4. Where authority to make an award has been conferred upon commissioners by Act of Parliament, the Court has no jurisdiction by way of appeal to set it aside. And where a railway company, in accordance with the provisions of an Act of Parliament, altered the gauge of their line "on the terms of their being paid an equitable portion of the expense thereof, such expense and proportions to be borne by the several companies whose interest would be advanced by such alteration;" and it was enacted that the plaintiffs should pay to the defendants such proportion of the expense as should be agreed upon between the parties, or, in case of their difference, as might be determined by the award of the Railway Commissioners, who had succeeded to the functions of the Board of Trade in respect of railway matters; and the several companies not being able to agree, the question had been referred to the commissioners, and an inquiry had been by them instituted, at which no person on behalf of the plaintiffs attended, and at which it appeared from the evidence that no notice was formally given them to attend, but at which the expenses of the alteration were divided and apportioned among the several companies; and notice of the award by the commissioners had been sent to the plaintiffs, and their portion of the expenses demanded, but, not being paid, an action had been commenced; and the plaintiffs impugned the fairness of the award, inasmuch as the sum demanded was the proportion of the expense for seventy-one miles instead of four only; on a bill by the plaintiffs to set aside the award and to restrain the action for the above reason, and also as the plaintiffs had subsequently had recourse to, and had memorialised the commissioners, the bill was dismissed with costs (2); and, *per* Lord

(1) *Harding v. Wickham*, 2 J. & H. 676; *vide* pl. 9, p. 1057, *ante*.

Co. v. Ulster Railw. Co., 2 Jur. (N. S.) 60, 936.

(2) *Newry and Enniskillen Railw.*

Justice Turner, the bill was rightly dismissed, for that, having regard to the position of the Board of Trade, and to the nature of the matter referred to them, it was not the intention of the Act to make them mere arbitrators, bound by the legal obligations to which ordinary arbitrators are subject, but to give them a discretionary power, with the exercise of which a Court of Equity has no jurisdiction to interfere, and for the due exercise of which the Board of Trade was responsible only to Parliament; and *quære*, whether, where a matter is referred by Act of Parliament to the arbitration of a public board, the parties must not abide by the course of practice which that board is in the habit of adopting, though such practice be not conformable to what the law would require of a private arbitrator (1).

5. In any proceedings at Law or in Equity respecting a benefit building society, the primary consideration for the Court is, that the Legislature has provided a cheap and summary mode of settling any question concerning their affairs by arbitration, with the intention carefully to provide that these societies should not be subjected to expensive litigation. The object of these societies is to raise a fund by means of which the members may be enabled to purchase land or houses, and the mode by which this is to be done is by investing the subscribed moneys upon very advantageous terms, under powers given them by statute; and where the rules of such a society authorized the directors to invest the funds on mortgage for ten years at any rate of interest, or in building on or improving land mortgaged to them, and authorized members to withdraw their shares upon giving a certain notice, and provided that such members should not be liable to any further fines, but should be entitled to receive the nett amount of their subscriptions paid, with interest, and also a share of profits, but no time was specified for making such payments, and the directors had power to pay such claims in the order in which they arose, and the amount payable to a withdrawing member having been referred to arbitration; Vice-Chancellor Sir W. P. Wood held, that it was competent to the arbitrator to consider when, consistently with the due prosecution of the other objects of the society, such

In any proceeding at Law or in Equity respecting benefit building societies, the primary consideration is, that the Legislature has provided a cheap and summary remedy by arbitration.

(1) *Newry and Enniskillen Railw. Co. v. Ulster Railw. Co.*, 2 Jur. (N. S.) 60, 936.

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payment should be made, and to fix a time for such payment accordingly; and also that a Court of Equity had no jurisdiction to alter the award, unless there was error upon the face of it, or it was shewn to have been corruptly obtained; and, therefore, where a principal sum and interest only were awarded, the Court would not calculate whether the amounts were correct according to the rules, or whether the principal sum included profits or not; but the award having directed a sum to be paid for costs, which the arbitrator had no power to do, except by a rule made after a member had given notice to withdraw; the Vice-Chancellor said, that where part of an award is *extra vires* and severable, the Court rejects that part and upholds the rest of the award; and that if it had been discussed, and if upon the agreement he should have been satisfied that it was *extra vires*, all he should have done would have been to stay the proceedings as to that part which was *extra vires* (1).

Where part of an award is *extra vires* and severable, the Court rejects that part and upholds the rest.

The Court will admit evidence of arbitrator in explanation of his award. If there has been a mistake on his part as to the subject matter, or in point of legal principle affecting the basis of the award, the award will be set aside or referred.

6. The Court will admit evidence of an arbitrator in explanation of his award; and when it appears from such evidence that there has been a mistake on his part, either as to the subject matter referred to him, or in point of legal principle affecting the basis on which the award is made, the award will be set aside or referred back to the arbitrator (2). This was a motion that an award made in the matter of an arbitration (the submission to arbitration having been made a rule of Court by the parties moving, Messrs. Rhys & R.), between the company and Messrs. Rhys & R., by J. C., the umpire, might be set aside; the Vice-Chancellor Sir G. M. Giffard, on the above grounds, referred back the whole matter, and (here) to the same arbitrator.

7. Where a plaintiff disputed an award of valuers for the price of growing crops, on the ground that it was made upon a wrong principle, and on settlement he took the sum awarded, and signed a receipt for it, writing the words, "under protest," at the top, and nine months after filed a bill to set aside the award; the Master of the Rolls, Lord Romilly, held, that he was precluded by delay, and what amounted to acquiescence, from contesting the

(1) *Armitage v. Walker*, 2 K. & J. L. R. 6 Eq. 429; 37 L. J. (Ch.) 719; 211; 2 Jur. (N. S.) 13. *vide* p. 928, *ante*, pl. 118.

(2) *Dare Valley Railw. Co., In re*,

award (1); the Master of the Rolls said the plaintiff had “waited nine months, and then filed his bill, on the ground that he had reserved his rights by writing the words, ‘under protest,’ on the receipt. If sincere, he ought to have given back the money when he disputed the amount. He could not take advantage of the transaction, and then dispute it,” and dismissed the bill with costs.

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SECT. 16. *Public Policy.*

1. The law of the Court was, prior to the 31 Vict. c. 4, that it would restrain actions on *post obit* bonds, and other securities founded on expectations, unless the actual value had been given, as contrary to the principles of this Court (2). In this case, where a person was eighty-two years old, and his three sons, all between thirty and forty, borrowed £1000, and gave a bond for £2500, on the death of the father, if one of the sons was then living; the Vice-Chancellor granted an injunction, on the ground that the sum paid was not the actual value of the bond; but the 31 Vict. c. 4, s. 1, enacts that “no purchase made *bonâ fide*, and without fraud, or unfair dealing, of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue;” and a subsequent motion to set aside the injunction was refused with costs; the Court holding such a case was an exception to the general rule, that the costs of a motion for an injunction, or to dissolve an injunction, are costs in the cause.

2. In *Platamore v. Staple* (3), an injunction was granted to restrain the defendant from suing for a rent-charge which had been granted to him to qualify him to sit in Parliament, the purpose never having been answered.

3. Where a bond, which had been given by a person about the age of twenty-two, conditioned to marry the obligee (a female servant about the same age, whom the plaintiff by letters had repeatedly assured that he would make her his wife on the death of

(1) *Parrott v. Shellard*, 16 W. R. 928. (2) *Marsack v. Reeves*, 6 Madd. 108; *vide* pl. 47, p. 1049, *ante*.

(3) *Coop.* 250.

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a third person, and continued those assurances after he had married another woman), or pay money, had been established at Law; a verdict for the obligee having been recovered, the Court granted an injunction to restrain execution till the hearing, on the ground of public policy, it being an engagement by the obligor upon expectations by him under the will of a third person (the servant's master, to whom the plaintiff had been apprenticed), though not a relation, from whom it was kept secret, to marry at his death; and on the ground also that there was no mutuality whatsoever, as she was bound to nothing, not even a parol promise of marriage, upon which an action upon the case would lie (1); reserving to the hearing, as Lord Chancellor Eldon observed, the grave and serious question whether such an instrument could be permitted to stand (2).

SECT. 17. *Gaming—Gambling—Wagering Transactions.*

1. By the statute of Ann., the 9 Ann. c. 14, s. 1, notes, bills, bonds, judgments, mortgages, and other securities or conveyances given in respect of a gambling transaction, were absolutely void; but Equity had jurisdiction to relieve against such instruments, as by decreeing repayment of money paid under them (3), or restraining proceedings at Law, and ordering them to be delivered up to be cancelled (4). The 5 & 6 Will. 4, c. 41, repeals the above-named provision of the 9 Ann., and enacts that such bills and notes or mortgages, instead of being absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration.

2. In *Firebrasse v. Brett* (5) the Lord Chancellor, considering the circumstances of the case, and the greatness of the sum won (£2400) in one evening, granted an injunction until the hearing of the cause to stay proceedings at Law for forcibly taking from the defendant money which he had won of the plaintiff at play;

(1) *Cook v. Baker*, 1 Str. 34.

(2) *Cock v. Richards*, 10 Ves. 429.

(3) *Ramden v. Shadwell*, Amb. 269;
vide S. C. p. 383, *ante*.

(4) *Newman v. Franco*, 2 Anstr.

519; *Andrews v. Berry*, 3 Anstr. 634;

Blackwell v. Redman, 1 Ch. Rep. 48;

Humphrey v. Rigby, 2 Freem. 223.

(5) 1 Vern. 489, 2nd Ed.

though the defendant had, by his answer, denied all the circumstances of fraud and circumvention charged in the bill; but confessed that the money was won at play, but said it was won fairly. The Lord Chancellor said he thought the sum very exorbitant for a man to lose at play in one night, and that if it was in his power he would prevent it; and cited the case of Sir Cecil Bishop and Sir John Staples, in Lord Chief Justice Hale's time, about a wager upon a footrace, and that the Chief Justice in that case said that those great wagers proceeded from avarice and were founded in corruption.

3. If the consideration for a judgment is a gambling transaction, the Court will restrain a sale under a *fi. fa.* on the judgment so decided on appeal (1).

4. Upon an action brought to recover a sum of money lent upon the security of an I. O. U., and a bill filed by a plaintiff to discover whether the money had not been lent for the purpose of gaming, the Court held that the defendant was bound to state by his answer whether it was so lent, it being then still a question open to argument in a Court of Law whether money lent at play, or for the purposes of play, was recoverable in an action at Law. But the Lord Chief Baron, upon the motion to dissolve the common injunction which had been obtained, said that if he had any satisfactory evidence of what the law of France was (the question having been raised whether the transaction, which took place at Paris, was legal under the Code Civil (Arts. 1964, 1965)), he should have been disposed to enter fully into the question which had been argued; but that there was not sufficient in the pleadings for the Court to proceed upon; and he agreed with the counsel for the defendant in thinking that a more distinct case ought to have been raised by the bill and answer in order to determine the question in Equity; and as to the written instrument, he saw no reason why he should then order it to be delivered up to be cancelled, for it was not precisely similar to other instruments which had been made use of in transactions of that nature; there was a difference between a bill of exchange, which is negotiable, and an I. O. U., which is only evidence of the debt, and he dissolved the injunction (2).

(1) *Cremorne (Lord) v. Bruen*, 2 Moll. 496.

(2) *Wilkinson v. L'Eaugier*, 2 Y. & C. 363.

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5. In a suit instituted to restrain proceedings on bills of exchange, alleged to have been given for moneys lost at play, an injunction, until the hearing of the cause or further order, was obtained upon the answer of the defendant, the plaintiff paying into Court the amount of the bills and interest; but at the hearing, the plaintiff having no evidence in support of his case, and the defendant in his answer denying all knowledge of the gambling transaction out of which the bills were said to have originated; and having sworn that he gave valuable consideration for them, though as to the particulars of that consideration his statements were vague and not very satisfactory, the bill was dismissed with costs; and under such circumstances the decree ought to direct the fund in Court to be paid to the defendant, without putting him to the further prosecution of the action, or awaiting its result (1). A holder may recover in an English Court on a bill drawn in France on a French stamp, though, in consequence of its not being in the form required by the French code, he had failed in an action which he brought on it in France (2).

6. Gambling debts contracted in this country, as well as the securities given for them, are void (3), and cannot be recovered; but money won at play, or lent for the purpose of gambling, in a country where the games in question are not illegal, may be recovered in the Courts of this country; and, therefore, where an unascertained portion of a balance of account, for which an I. O. U. had been given, was admitted to consist of money lent for the purpose of playing at public tables in Germany; but it did not appear that the games played at such tables were forbidden by the laws of that country; the Court, on appeal from the Vice-Chancellor of England, dissolved an injunction which had been granted to restrain an action brought to recover the whole balance, the Lord Chancellor saying that as the memorandum (*i.e.* the I. O. U.) afforded *prima facie* evidence of the debt, and that as there was nothing to shew that any part of it was founded upon an illegal consideration, he saw no reason why this Court should interfere, or why the defendant should not be allowed to prosecute his action (4).

(1) *Wynne v. Jackson*, 2 Russ. 351.

(2) *Ib.*

(3) The securities are not void, but

to be taken as made for an illegal consideration; *vide* pl. 1, p. 1202, *ante*.

(4) *Quarrier v. Colston*, 1 Ph. 147.

SECT. 18. *Usury.*PART II.
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1. Where both parties are *in delicto*, concurring in an illegal act, it does not always follow that they stand *in pari delicto*; for there may be, and often are, very different degrees in their guilt (1). One party may act under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age, so that his guilt may be far less in degree than that of his associate in the offence (2); and, besides, there may be a necessity of supporting the public interests or public policy in many cases on the part of the Court itself, however reprehensible the acts of the parties may be (3).

2. In cases of usury (4) this distinction has been adopted by Courts of Equity. All such contracts being declared void by the statute against usury, Courts of Equity will follow the Law in the construction of the statute. If, therefore, the usurer or lender come into a Court of Equity seeking to enforce the contract, the Court will refuse any assistance, and repudiate the contract (5); but, on the other hand, if the borrower come into a Court of Equity seeking relief against the usurious contract, the only terms upon which the Court will interfere are—that the plaintiff will pay the defendant what is really and *bonâ fide* due to him, deducting the usurious interest; and if the plaintiff do not make such offer in his bill, the defendant may demur to it, and the bill will be dismissed (6). The ground of this distinction is, that a Court of Equity is not positively bound to interfere in such cases by an active exertion of its powers;

(1) *Smith v. Bromley*, Doug. 696; *Browning v. Morris*, Cowp. 790; *Osborne v. Williams*, 18 Ves. 379.

(2) *Bosanquet v. Dashwood*, Cas. t. Tal. 37, 40, 41; *Chesterfield v. Janssen*, 2 Ves. Sen. 156, 157; *Osborne v. Williams*, 18 Ves. 379.

(3) See *Woodhouse v. Meredith*, 1 Jac. & W. 224, 225; 1 Fonbl. Eq. b. 1, ch. 4, § 4, n. (y); *Bosanquet v. Dashwood*, Cas. t. Tal. 37, 40, 41; *Smith v. Bromley*, Doug. 696, n.; *Browning v. Morris*, Cowp. 790; *Morris v. McCulloch*, 2 Eden, 190, and note

193; Story, Comm., Equity Jurisprudence, vol. i. p. 244, 2nd Ed.

(4) See now the 17 & 18 Vict. c. 90, pl. 3, *post*.

(5) 1 Fonbl. Eq. b. 1, ch. 1, § 3, n. (h); *Fanning v. Dunham*, 5 John. Ch. R. 142, 143, 144.

(6) 1 Fonbl. Eq. b. 1, ch. 1, § 3, n. (h); Id. b. 1, ch. 4, § 7, n. (k); *Mason v. Gardiner*, 4 Bro. C. C. 436; *Rogers v. Rathbun*, 1 John. Ch. R. 367; *Fanning v. Dunham*, 5 John. Ch. R. 142, 143, 144.

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but it has a discretion on the subject, and may prescribe the terms of its interference; and he who seeks equity at its hands may well be required to do equity. And it is against conscience that the party should have full relief, and at the same time pocket the money loaned, which may have been granted at his own mere solicitation (1); for then a statute, made to prevent fraud and oppression, would be made the instrument of fraud. But, in the other case, if Equity should relieve the lender, who is plaintiff, it would be aiding a wrongdoer who was seeking to make the Court the means of carrying into effect a transaction manifestly wrong and illegal in itself (2). And, upon the like principles, if the borrower has paid the money upon a usurious contract, Courts of Equity (and indeed Courts of Law also) (3) will assist him to recover back the excess paid beyond principal and lawful interest, but not further; for it is no just objection to say that he is *particeps criminis*, and that *volenti non fit injuria*. It would be absurd to apply the latter maxim to the case of a man who, from mere necessity, pays more than the other can in justice demand, and who has been significantly called the slave of the lender. He can in no just sense be said to pay voluntarily; and as to being *particeps criminis*, he stands *in vinculis*, and is compelled to submit to the terms which oppression and his necessities impose on him (4); nor can it be said, in any case of oppression, that the party oppressed is *particeps criminis*, since it is that very hardship which he labours under, and which is imposed upon him by another, that makes the crime (5).

3. By the 17 & 18 Vict. c. 90, intitled "An Act to repeal the

(1) *Scott v. Nesbit*, 2 Bro. C. C. 641; S. C. 2 Cox, 183; *Benfield v. Solomons*, 9 Ves. 84.

(2) 1 Fonbl. Eq. b. 1, ch. 1, § 3, n. (h); Id. b. 1, ch. 4, § 7, and n. (k); Story, Equity Jurisprudence, vol. i. p. 244, 2nd Ed.

(3) 1 Fonbl. Eq. b. 1, ch. 4, § 7, and n. (k); *Smith v. Bromley*, Doug. 696, n.; *Browning v. Morris*, Cowp. 792; *Bond v. Hays*, Ex., 12 Mass. 34.

(4) *Smith v. Bromley*, Doug. 696, n.; *Bosanquet v. Dashwood*, Cas. t. Tal. 39; *Browning v. Morris*, Cowp. 790; *Rawden v. Shadwell*, Amb. 269; and

Mr. Blunt's notes, 1 Fonbl. Eq. b. 1, ch. 4, § 8, n. (k).

(5) Lord Chancellor Talbot, in *Bosanquet v. Dashwood*, Cas. t. Tal. 41. The same principle applies to cases of annuities set aside for want of a memorial duly registered; and an account of the consideration paid, and payments made, will be taken, and the balance only will be required to be paid, upon a decree to give up the security; *Holbrook v. Sharpey*, 19 Ves. 131; Story, Comm., Equity Jurisprudence, vol. i., p. 215.

Laws relating to Usury and to the Enrolment of Annuities," passed the 10th of August, 1854, all the then existing laws against usury were repealed (s. 1); reserving all rights and remedies, and leaving undisturbed the liabilities of any person in respect of any act done previously to the passing of the Act (s. 2) (1).

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(1) For cases other than those already cited, prior to the 17 & 18 Vict. c. 90, upon the law of contracts and instruments in fraud of the usury laws, shewing where Equity interfered in cases of usurious contracts, or in cases of contracts apparently fair, but in fact entered into fraudulently for the purpose of concealing a usurious transaction; see *Searle v. Lord Carpenter*, Amb. 242; *Piers v. Tuite*, 1 D. & Wal. 279; *Lawley v. Hooper*, 3 Atk. 278

3rd Ed. (and see the cases there cited); and upon bills upon allegations of such purpose, where the Court refused to interfere, in cases other than those already cited, see *Fereday v. Hordern*, Jac. 144; *Clark v. Giraud*, 1 Madd. 511; *Chesterfield v. Janssen*, 2 Ves. Sen. 125, 142; *et vide* *Drewry*, Inj., 32; *Eden*, Inj., p. 16, and the cases there cited. For the Law of Courts of Equity in the United States on usury, see *Hilliard*, Inj., pp. 16, 67, &c., 2nd Ed.

CHAPTER V.

PERSONS AND RELATING TO PERSONS.

PART II.

SECT. 1. *Principal and Agent.*

An action of trover will not be restrained (here) in a suit setting up agency of defendant, on the ground that the Court ought to ascertain the facts or direct an issue.

1. An action of trover will not be restrained on the ground that the Court of Chancery ought to ascertain the questions of fact or direct an issue; thus in a suit by a plaintiff, alleging that the defendant had been employed by him as his agent for the sale of horses, and that, being unable to obtain from the defendant the particulars of the transactions as to the sales and purchases, he (the plaintiff) had served the defendant with notice to determine the agency, and had subsequently removed several horses from his premises, upon which the defendant had commenced an action of trover, Vice-Chancellor Sir J. Stuart refused an injunction with costs (1).

2. Where an agent was, *quâ* agent, obliged to indorse a bill, and the fact was known to indorsees, an injunction was granted to restrain proceedings thereon against him (2).

3. The Court will not grant an injunction to restrain a confidential agent from suing his employer upon a bond given by the latter in respect of demands that arose during the continuance of the agency, but given after its termination; however, if a case were made of peculiar distress at the time of the bond given, the Court might interfere (3).

4. One for whose use an action at law is brought, which fact is apparent from the record, should be made a party to a bill enjoining the judgment (4).

(1) *Curlewis v. Carter*, 9 L. T. (N. S.) 407; *vide* S. C. p. 1108, *ante*.

(2) *Kidson v. Dilworth*, 5 Price, 564.

(3) *Strathmore v. Fortune*, 1 L. J. (Ch.) 108.

(4) *Turner v. Cox*, 5 Litt. 175 (Amr.)

SECT. 2. *Creditor—Debtor and Creditor.*

1. If a creditor of a testator obtains judgment against the executor *de bonis testatoris* before a decree has been made for the administration of assets, and a decree in an administration suit is afterwards obtained by another creditor, the Court will not restrain the creditor at Law from issuing execution. And where a judgment creditor had, before the date of the decree, obtained a garnishee order *nisi* under sect. 61 of the 17 & 18 Vict. c. 125, a motion for an injunction to restrain him from proceeding further at Law was refused, with costs (1).

The Court will not restrain a creditor of a testator who has obtained judgment against an executor *de bonis testatoris* before a decree in an administration suit from issuing execution.

2. The principle upon which a Court of Equity restrains a creditor from enforcing his legal rights against the estate of the deceased debtor, is, that the creditor is enabled to bring into Equity, with some specified exceptions, all his legal rights, and that the validity of his debt must be determined in Equity upon the same principle as at Law (2).

3. The Court will not restrain a creditor from prosecuting his legal remedy against the personal representatives of his debtor, unless there is a decree under which the creditor has a present right to go in to prove his debt (3). And notwithstanding a reference to take the usual accounts of an estate, and of the debts, had been ordered upon motion under the 5th Order of May 1839 (now abrogated, and republished in the Consolidated Orders, No. 20), it was held that the Court could not interfere to restrain the sheriff from selling or parting with goods taken in execution upon a *fi. fa.* issued three days before the testator's death, by a judgment creditor of the testator, to anyone but the executor, unless there was in existence a decree under which the creditor had a present right to go in and prove his debt, which he could not do in this case (4).

The Court will not restrain a creditor from prosecuting his legal remedy against the personal representatives unless there is a decree under which the creditor has a right to prove his debt.

4. The Court will, on the application of the administratrix, party to an administration suit, restrain a creditor from proceeding with his action, but will give him all his costs at Law, and

(1) *Roberts, In re, Fowler v. Roberts*, 2 Giff. 226; *vide* S. C. p. 1214, *post*.

(2) *Whitaker v. Wright*, 2 Hare, 310.

(3) *Rankin v. Harwood*, 2 Ph. 22; 5 Hare, 215.

(4) *Teague v. Richards*, 11 Sim. 46; 9 L. J. (N. S.) Ch. 293.

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also the costs of the motion; as where, after a creditor had commenced an action against the administratrix of his debtor, a decree was made in a suit against the administratrix for the administration of the intestate's estate; and the administratrix gave notice of the decree to the creditor, but he then gave notice to her that he should proceed with his action unless he was paid the costs of it; and the costs not being paid, he delivered his declaration, whereupon the administratrix appeared to the action and called on the creditor (who was out of the kingdom) to give security for the costs of it; the Court restrained the creditor, but ordered the administratrix to bring the intestate's estate into Court (1).

5. Though in *Bookless v. Crummach* (2) a creditor's judgment obtained before the decree in a creditor's suit entitled him to execution *de bonis propriis* of the executor, the Court granted an injunction against the creditor to restrain proceedings thereon at Law; and in *Egan v. Baldwin* (3), a creditor who had obtained judgment by default against an executor *de bonis propriis* was restrained from issuing execution, there being a decree for the administration of the assets, although the decree was subsequent to the judgment; yet in *Terrewest v. Featherby* (4) an injunction, after a decree to account, to restrain a creditor from proceeding at Law upon a verdict obtained before the decree, which would entitle him to a judgment *de bonis propriis* against an executor, was refused. After a decree for administration in a creditor's suit the Court will restrain a creditor of the testator from proceeding at Law against the assets, but not from proceeding against the executors personally (5). A judgment creditor, not a party, will not be allowed to proceed at Law if a receiver has been appointed in a creditor's suit, and a prior incumbrancer is a party (6).

6. Where after a decree for administration of assets an executor pleaded a false plea to an action brought against him by a creditor of the testator, in order to have an opportunity of applying for an injunction to restrain the action, the Court granted an injunction,

(1) *Turner v. Connor*, 15 Sim. 630.

(2) Coop. P. C. 125.

(5) *Kent v. Pickering*, 5 Sim. 569.

(3) 2 Moll. 532; 1 Hog. 195.

(6) *Thackaberry v. Christian*, 1 Hog.

(4) 2 Mer. 480.

and held the creditor not entitled to a judgment against the executor *de bonis propriis* (1).

7. Where an administration decree had been obtained before action brought, the defendant, a creditor, not having notice of the decree or of this application, although an injunction to restrain proceedings at Law was granted, yet all the creditor's costs were ordered to be first paid (2).

8. If a Court of Common Law has full jurisdiction to deal with the case the Court will refuse an injunction; thus where a shareholder in a company, who was also a creditor of the company, obtained judgment against the company for money due to him, and the assets of the company had been assigned to another company, of which he had also become a shareholder, and not being able to obtain payment of his debt he gave notice under sect. 68 of the Joint Stock Companies Registration Act, 7 & 8 Vict. c. 110, to another shareholder in the first company, who had not become a shareholder in the second company, that he should proceed against him, individually, to recover the debt; upon a bill for an injunction by the shareholder so proceeded against to restrain the proceedings at Law, but without asking for other relief (as, for instance, admitting that the defendant was a creditor of the company and that he, the plaintiff, was a shareholder, and insisting that the defendant and others were also shareholders, and therefore, that though it was just the defendant's debt should be paid, it was also just that all the shareholders should contribute *pro ratâ* to pay the debt, and that the plaintiff was willing to make his contribution towards it), the injunction was refused with costs, on the ground that a Court of Common Law had full jurisdiction to deal with the case (3). And where a creditor obtains judgment against a company without collusion or fraud, and proceeds to enforce it by *scire facias* against a shareholder, a Court of Equity will not restrain the proceedings, or inquire into the validity of the judgment, but will leave the shareholder to raise his defence by pleading to the *scire facias* (4).

If a Court of Common Law has full jurisdiction to deal with the case, this Court will refuse an injunction.

(1) *Fielden v. Fielden*, 1 S. & S. Sm. 101; 6 Jur. (N. S.) 88; *vide* S. C. 255. p. 979, *ante*.

(2) *Farlow v. Wilson*, 11 Price, 95. (4) *Green v. Nixon*, 23 Beav. 530;

(3) *Hardinge v. Webster*, 1 Dr. & 3 Jur. (N. S.) 993.

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9. Where a petition for winding up a company under the Joint Stock Companies Acts, 1856, 1857, had been presented, the Court would restrain a creditor from suing the company until the petition had been disposed of (1).

The Court will at the suit of a purchaser for specific performance restrain a judgment creditor of the vendor from proceeding at Law against the purchaser who had not paid the

10. Where A. entered into an agreement for the purchase of an estate, and paid a deposit, and entered into possession, but did not pay the remainder of the purchase money, and afterwards a creditor of the vendor obtained a judgment against him and sued out an *elegit*, and then brought an action of ejectment against A. ; upon A. filing a bill against the vendor and the judgment creditor, praying to have the agreement specifically performed, and for an injunction, the Court restrained the judgment creditor from proceeding in any action against him (2).

whole of the purchase-money, and was in possession.
The Court will restrain a mortgagee from proceeding in an action against the mortgagor where there is a question whether the mortgagee is a purchaser or mortgagee only.

11. In *Drummond v. Pigou* (3) a special injunction was granted under the circumstances (namely, that a question was raised whether the defendant was a mortgagee only, or whether the parties stood in the relation of vendor and purchaser; the suit being for specific performance of a contract for sale to the defendant of the premises, which were mortgaged to him), to stay process of outlawry, and all further proceedings at Law to recover the mortgage money and interest, against the plaintiff in Equity, though the common injunction had not been obtained; the plaintiff in Equity to give judgment in the action, with stay of execution, to be dealt with as the Court should direct.

12. Where a decree for the administration of the estate had been pronounced pending the action, an injunction was granted against the plaintiff, a creditor, on payment of his costs at Law, though on a set-off, and a *plene administravit præter* pleaded, the verdict was against the executor on all the pleas (4).

13. Where an administration decree had been pronounced in a suit, and served on a creditor of the testator in the suit, and afterwards the creditor's debt was disputed and he brought an action for it against the representatives of the testator, the action was

(1) *Northumberland and Durham District Banking Company*, 4 Jur. (N. S.) 154.

(2) *Brunton v. Neale*, 14 L. J. (N. S.)

Ch. 8.

(3) 2 My. & K. 168; 4 L. J. (N. S.) Ch. 27; *vide* S. C. p. 186, *ante*.

(4) *Lord v. Wormleighton*, Jac. 148.

restrained, but it was held that the creditor was only entitled to receive his costs when he had established his debt (1).

14. In *Hoops v. Kingston (Earl of)* (2) it was held that after a decree to account in an administration suit, the Court will restrain a creditor from proceeding in a suit instituted by himself, only when the executor has, in his answer or in some other way, given an account of the assets, and brought the amount into Court.

15. In *Curre v. Bowyer* (3) it was held that a creditor proceeding against an executor at Law after notice of a decree to account, is so far committing a contempt that upon application for an injunction the Court will refuse him the costs of further proceedings at Law, and the costs of the application.

16. After a decree for the administration of a testator's estate creditors will be restrained from suing at Law on the application of a legatee (4).

17. Notwithstanding all a debtor's estate had been taken from him by an Act of Parliament (7 Geo. 1, c. 27), vesting all his estate in the trustees of the South Sea Company, and making a provision for the payment of his debts out of his estate, yet the Court refused an injunction to the debtor, who had been one of the directors of the South Sea Company, and who owed money which had been recovered against him at Law, on the ground that the Act was not made in favour of the directors (5).

18. The Court refused with costs a motion on behalf of the defendants, executors, in a suit to administer the personal estate, to restrain a creditor, after a decree, from issuing execution on a judgment obtained before the decree, against an executor, *de bonis testatoris et si non de bonis propriis*. As to costs, in this case the decision was founded on the nature of the suit (an administration suit by legatees), the time of filing the bill, the statement as to assets in the answer, and the time of obtaining the decree, and the absence of any explanation of the state of the assets at the time of the motion to restrain the execution, and to the time of bringing the action and obtaining judgment, and the rights of the

(1) *King v. King*, 10 L. T. (N. S.) 832. (4) *Clarke v. Earl Ormonde*, Jac. 122.

(2) Fl. & K. 246.

(5) *Holditch v. Mist*, 1 P. Wms. 695,

(3) 3 Madd. 456.

5th Ed.

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creditors here to satisfaction out of the assets of the testator, and if none, then to an action which would entitle them to satisfaction out of the goods of the executor; and that if there were a deficiency of assets, the claimants in the suit would suffer, because they used less diligence than the plaintiffs at Law, but would not suffer at all if the executors were held to have a right to stand against the assets only in the situation in which the creditors would have stood upon a just administration (1).

If heir plead a false plea, the Court will after an administration decree restrain execution against ancestor's assets, but not from proceeding against heir.

19. If in an action by a bond creditor against the heir of an intestate, the latter plead a false plea, the Court will, after a decree obtained in a suit by another creditor, for the administration of the intestate's assets, restrain the plaintiff at Law from taking out execution against the assets, but not from proceeding against the heir personally (2).

20. A judgment debtor, who is debtor as an executor or administrator, is within the garnishee clauses of the 17 & 18 Vict. c. 125; and therefore a debt owing to the testator, and due to such judgment debtor in his representative capacity, may be attached by a judgment creditor of the executor in the same right (3). And a judgment creditor (the judgment having been recovered on the 24th of April, 1860) may proceed against the garnishee notwithstanding a decree for the administration of the estate in Chancery (which was after the judgment, namely, the 13th of May, 1860), and a Court of Equity will not interfere with or restrain such proceedings (4).

21. Where a garnishee order had been obtained by a judgment creditor against a receiver appointed by the Court of Chancery, the receiver not objecting to the order being made, and the receiver had paid over to the judgment creditor moneys in his hands as such receiver, the judgment creditor was ordered to repay the moneys, and he and the receiver were both made liable to pay the costs on the motion (5).

22. Where a creditor had continued his proceedings at Law

A creditor continuing

(1) *Lee v. Park*, 1 Keen, 714.

(2) *Price v. Evans*, 4 Sim. 514. 1189; S. C. *nom. Fowler v. Roberts*,

(3) *Burton v. Roberts*, 29 L. J. (Ex.) 2 Giff. 226, *vide* S. C. p. 1209, *ante*.
484.

(5) *De Winton v. Brecon (Mayor of)*,
(4) *Roberts, In re*, 6 Jur. (N. S.) 28 Beav. 200; 6 Jur. (N. S.) 1046.

after notice of a decree for administration, he was ordered to pay the costs of a motion to restrain him, but was allowed to set them off against the costs of the proceedings at Law incurred prior to the notice (1). And where, upon a motion by the defendant, an administrator, after a decree in a creditor's suit, to restrain creditors from proceeding in an action at Law, the administrator having by his answer in the cause stated what assets had come to his hands, and having given the plaintiffs at Law notice, after they had served their writ, to come in and prove their demands under the decree; the Court held that the defendant was entitled to the injunction, and that the plaintiffs at Law were not entitled to any costs incurred by them after the notice (2). And also, that the fund being deficient, the payment of the costs was not a condition precedent to granting the injunction; and if the answer should not contain a sufficiently full statement of the assets received, the Court would allow the motion to stand over until the assets were accounted for (3). But after the common decree in a creditor's suit, the executor not denying that he has assets, nor disputing the debt, cannot obtain an injunction to restrain an action by a creditor of the estate against him, commenced before the suit, but not proceeded with since notice of the decree, except upon the terms of paying the costs at Law, and also of the motion for the injunction (4).

23. On an application being made to stay a creditor's suit, because of a decree obtained in an administration suit subsequently instituted by two of the executors against the third, as there was no evidence of the amount of the assets received by the executors, and as it appeared that the creditor's case in the first suit depended on vouchers and documents in the hands of the executors, the Court ordered the motion to stand over until the executors had put in their answer in that suit (5); and, *semble*, that a creditor whose suit in Equity is stayed, as well as a creditor who is restrained from prosecuting an action at Law, is entitled to have a discovery of assets possessed by the executors, and payment of the amount into Court (6).

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proceedings
at Law after
notice of an
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tion decree,
will be
ordered to
pay the costs
of a motion
to restrain
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(1) *Gardner v. Garrett*, 20 Beav. 469.

(3) *Ib.*

(2) *Pepper v. Foster*, 6 Ir. Eq. Rep. 384.

(4) *Cole v. Burgess*, 1 Kay (App.) 1.

(5) *Macrae v. Smith*, 2 K. & J. 411.

(6) *Ib.*

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24. Where a creditor, on the footing of a joint and several bond of B. and N. (having entered judgment against B. only) had proved under a decree to account in a suit against the assets of B., and he was also a party to the report under a decree to account in a supplemental suit affecting the assets of N., but did not prove under it; the Court restrained the creditor from proceeding at Law against the administrator of N. (1).

25. After a decree in a creditor's suit the Court will stop a creditor from proceeding in another suit for the recovery of a demand against the estate of a testator, if the object can be obtained in the first suit; but, *secus*, if the creditor would be unable to obtain relief in the first suit (2). And where there was a decree in a suit in the Exchequer, under which a creditor could have full relief, that Court restrained him from proceeding in a suit in Chancery against the same estate (3).

26. The Court, in *Roveray v. Grayson* (4), on the coming in of answer, dissolved an injunction obtained by bail against a creditor who had obtained a verdict, the principal debtor, though a defendant, not being within, and stated by the bill to be out of, the jurisdiction.

27. Where there was a decree for payment of debts, &c., on the suit of the trustees against the heiress and executrix, and the persons claiming under the will, a bond creditor, although he insisted he knew nothing of the decree, was restrained by injunction from proceeding at Law against the executrix (5). Lord Chancellor Thurlow said, as a bill had been brought for payment of debts, and a decree had been made for taking an account of them and payment, and the creditors might have satisfaction under it; he would not permit the defendant in this suit (*i.e.*, a bill for an injunction to restrain the creditors proceeding at Law) to proceed at Law, which would be rendering the decree nugatory.

28. In *Powell v. Walworth* (6), where a creditor had been restrained from proceeding at Law on account of a decree obtained,

(1) *Cuffe v. Young*, 8 Ir. Eq. Rep. 37.

(2) *Costerton v. Costerton*, 2 Keen, (4) 3 Sw. 145.

774. (5) *Brooks v. Reynolds*, Dick. 603;

(3) *Pidgeon v. D'Alton*, J. & C. 1 Bro. C. C. 183.

276. (6) 2 Madd. 183.

he was allowed to prosecute a suit where proceedings on the decree had been delayed for some years (1).

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29. If a judgment creditor has sued out an *elegit*, and is in possession, whereby he has a specific lien, the Court cannot put him on a level with another judgment creditor who has not sued out an *elegit*; but if there are two judgment creditors, though neither has sued out an *elegit*, the prior judgment shall be first satisfied (2).

30. A judgment creditor who has notice of the possession of lands by a receiver, will not be allowed to continue proceedings by ejectment to recover the possession of them, if they were taken without the leave of the Court, and after he had notice that the receiver was in possession (3).

31. Parties to a suit, and all persons coming in under the decree, will be enjoined from disturbing a purchaser. If fifty judgment creditors come in, and only a few can be paid, the others will be restrained, and where there is original jurisdiction (as in carrying a trust into execution), if the old judgment creditors will not come in, they are restrained from proceeding against those lands in future (4).

32. Where A., a bond creditor of the intestate for £600, brought an action against the administratrix, who pleaded no assets *ultra* £54; and then A., not being satisfied with the inventory, procured the archbishop's commissary to assign to him the administration bond, upon which he brought three actions, one against the administratrix, and one against each of the sureties to the bond, and assigned for breach of the bond that the administratrix had not exhibited a true inventory; and no defence was made, and the administratrix suffered judgment by default; the Court, on a bill by the sureties to stay the proceedings at Law on the ground that no defence having been made bespoke a consciousness that there was none, decreed that the judgment should stand as a security for so much as the account to be taken on the inventory should fall short to satisfy A. his principal and interest on his bond, and proceedings on both the bonds were stayed till the master's report (5).

(1) 2 Madd. 183.

(2) *Rowe v. Bant*, Dick. 151.

(5) *Greenside v. Benson*, 3 Atk. 248;

(3) *Lees v. Waring*, 1 Hog. 216.

vide Canterbury (Archbishop of) v.

(4) *Stackpoole v. Curtis*, 2 Moll. 504. *Wills*, Salk. 315.

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33. Where creditors, having it in their power, obtained warrants for payment of an American loyalist's debt out of his estate there, Lord Chancellor Thurlow said that if the creditors could, *bonâ fide*, obtain anything there, they ought to do so; but the creditors swearing that they did not know of the debtor's property there till the filing of the bill, no *laches* could be imputed to them for not applying to a fund of which they were not informed, and dissolved an injunction to restrain them from proceeding on the bond, but gave the debtors liberty to use the creditors' name to obtain the warrants for payment in America, and make them available as far as might be (1).

34. Where a debt being payable by instalments, with interest, the debtor had made default in payment of one of the instalments, and by a deed reciting that the creditor had agreed to give the debtor time upon having the payment of the debt secured to him with interest, "by the instalments, and in manner thereafter appearing," with a provision for payment of the debt, with interest, by instalments different from the former ones, and a proviso that upon default being made in payment of any instalment the whole unpaid portion of the debt, with interest, should become immediately payable; and the plaintiff, although he executed the deed, alleged that he did so on the verbal assurance that this proviso and covenant should not be strictly enforced; and the debtor made default: Lords Justices Knight Bruce and Turner held, reversing a decision of Vice-Chancellor Sir J. Stuart, that the alleged parol agreement had not been proved, and that the proviso was not in the nature of a penalty, and that a Court of Equity ought not to restrain the creditor from enforcing immediate payment of the whole moneys remaining due (2).

35. A charging order, when made absolute, operates from the making of the order *nisi*, and not, as erroneously intimated in *Warburton v. Hill* (3), from the making of the order absolute. And where a creditor had recovered judgment against his debtor, and had issued a *fi. fa.*, and shortly afterwards the debtor died, and the creditor had entered a suggestion on the record entitling him to

A charging order when made absolute operates from the making of the order *nisi*, and the Court refused to restrain

(1) *Peters v. Irving*, 3 Bro. C. C. 595; 32 L. J. (Ch.) 682; 8 L. T. (N.S.) 54, *vide* S. C. p. 1058, *ante*. 344.

(2) *Sterne v. Beck*, 1 De G. J. & S. (3) Kay, 470.

have execution against the executrix, and had obtained a charging order *nisi* upon shares belonging to the debtor; and after the order *nisi* had been obtained, but on the same day, a decree was made for administration of the debtor's estate; and the order *nisi* not having been made absolute, the plaintiff in the administration suit applied for an injunction to restrain further proceedings by the judgment creditor, the Lords Justices Wood and Selwyn, affirming a decision of Vice-Chancellor Sir R. Malins, held, that an injunction ought not to be granted (1).

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proceedings by the creditor where the order *nisi* had been made prior to an administration decree, though on the same day.

SECT. 3. *Surety.*

1. If a creditor give time to a debtor without notice to the surety, this will release the surety, and an injunction will be granted to restrain proceedings at Law against him (2). And if a creditor having, among other things, a bond with a surety, take a mortgage from the principal debtor, and agree to receive the residue by instalments, secured by warrant, &c., without prejudice to any security he now holds, an injunction will be granted against suing the surety (3). But the rule of Law being always this, that you may suspend your rights for ever against the principal debtor, and yet preserve your rights against the surety, and that, even though you put into a deed words which in form are a release, the Court will not give that effect to them, but will take the whole of the deed together, and effectuate that which is the real intention of the parties. Therefore, where a debtor executed a deed under sect. 192 of the Bankruptcy Act, 1861, which contained a release from his creditors, followed by a proviso reserving any rights his creditors might have against any other persons in respect of any debt due by the debtor, either alone or jointly with any other persons; upon a bill by a surety—who, with the principal, had entered into a joint and several covenant in a mortgage deed for the payment of interest—to restrain an action for the interest, it was held, by Vice-Chancellor Sir G. M. Giffard, that the effect

If a creditor give time to a debtor without notice to the surety, the surety is released.

(1) *Haly v. Barry*, L. R. 3 Ch. 452;
37 L. J. (Ch.) 723; 16 W. R. 654; 18
L. T. (N. S.) 491.

(2) *Ireland (Bank of) v. Beresford*,
6 Dow. 233.

(3) *Boulbee v. Stubbs*, 18 Ves. 20.

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of the deed was to give a qualified release, and not to extinguish the debt; and that the remedy of the creditor against the surety for interest was not barred (1); and upon appeal this decision was affirmed, Lord Chancellor Hatherley holding that the deed only amounted to a covenant not to sue the debtor, and that the surety was not released, but that the surety could pay off the principal to the creditor and recover the amount from the debtor; and, *semble*, that under such a deed there would be a resulting trust of any surplus for the debtor.

2. If there has been an agreement to refer, and a reference between landlord and tenant, without the concurrence of the surety in a replevin bond, of matters in difference, whereby the performance of the condition of the bond (to proceed with effect) has been suspended, the Court will restrain the landlord from proceeding at Law, on an assignment of the bond, against the sureties (2).

3. Where, on the 15th of February, 1831, A. and B. dissolved partnership, A. leaving in the business, to be continued by B., the amount of his share; and on the same day B., as principal, and F., as surety, executed a bond for payment to A. of £5000 on the 15th of August following, with interest at £5 per cent.; and on the 21st of February, 1831, without the privity or consent of F., A. and B. agreed that the whole of the debt due by the latter to the former should, as to £1000, be paid within a year, and as to the residue within five years, by equal half-yearly payments, with interest; and in May, 1855, B. was adjudicated bankrupt, and under the bankruptcy A., or his assignee, received dividends; and in February, 1866, A. commenced an action against the representatives of F. to recover a large sum and interest, and thereupon a bill was filed to restrain the proceedings, and an injunction granted; on the hearing, Vice-Chancellor Sir J. Stuart directed that the injunction should be made perpetual, that A. should enter up satisfaction on the judgment obtained (by consent) against F.'s estate, and that A. should pay all the costs at Law and in Equity (3).

4. Where A. had joined B. in a promissory note, as surety for a

(1) *Green v. Wyun*, L. R. 7 Eq. 28;
17 W. R. 72, 385; L. R. 4 Ch. 204;
38 L. J. (Ch.) 220; 20 L. T. (N.S.)
131.

(2) *Boumaker v. Moore*, 3 Price,
214; 7 Price, 223.

(3) *Wright v. Sandars*, 3 Jur. (N.S.)
504.

moiety of a debt due from B. to C., with knowledge that the whole debt was also secured by a bill of sale of B.'s furniture, and C., who was also B.'s landlord, took the furniture under a distress for rent, which became due subsequently to the date of the bill of sale; Lords Justices Knight Bruce and Turner held (affirming the decision of the Master of the Rolls, Sir J. Romilly), that C. had precluded himself from appropriating the furniture to any other purpose than the debt for which it was given as a security, and that A. was entitled to be discharged to the extent of one half of the value of the furniture (1).

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A creditor appropriating the subject matter of a security to any other purpose, releases a surety with knowledge that the debt was so secured.

5. A surety, who has contracted to become so on the understanding that he is to be co-surety with another, is wholly released in Equity, if the intended co-surety does not execute. And where one of two intended co-sureties had executed a joint and several covenant for the repayment of moneys to be advanced to the principal debtor, on the understanding that the money would not be advanced until the deed was executed by the other surety; and the deed was never executed by the other surety, and no notice of his failure to execute had been given by the creditor to the executing surety until after the principal debtor had made default and become insolvent; Lords Justices Knight Bruce and Turner (affirming a decision of Vice-Chancellor Sir W. P. Wood) held, that the executing surety was entitled to be discharged in Equity from every part of the debt, and (the Lords Justices varying so much of the decree of the Vice-Chancellor as ordered the deed to be delivered up to be cancelled) to have an injunction to restrain all proceedings at Law under it, and that the surety had not lost his right by setting up this defence at Law by an equitable plea, still pending at the time of granting the injunction, to which the covenantees demurred in such a way as might leave the equitable ground untouched (2). In this case the Vice-Chancellor said, "In *Ex parte Gifford* (3), Lord Eldon appears to have entertained an opinion, though he did not positively determine the point, that after such security (*i.e.*, a joint and several one) has been executed,

A surety, who has contracted to become so on the understanding that he is to be a co-surety, is released in Equity, if the intended co-surety does not execute.

The release of one of two joint and several sureties is a discharge of

(1) *Pearl v. Deacon*, 3 Jur. (N. S.) 879, 1187; 24 Beav. 186; 1 De G. & J. 461.

(2) *Evans v. Bremridge*, 8 De G. M. & G. 100; 2 K. & J. 174; 2 Jur. (N. S.) 134, 311; 25 L. J. (Ch.) 102, 334.

(3) 6 Ves. 805.

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the other,
and so of joint
obligors.

the person taking it might release one of the sureties without discharging the co-surety from his liability." "But in *Nicholson v. Revill* (1) *Ex parte Gifford* was cited, and Lord Eldon's dictum was expressly overruled by the Court of Queen's Bench. The learned Judges in that case said, that it appeared to them that Lord Eldon had not decided the point, and could not have had all the circumstances before him; and then, upon the authority of the case in the Year Books, 21 Edw. 481 B, pl. 33, they held distinctly that a release of one joint obligor is a release of both, and that, therefore, the doctrine in *Ex parte Gifford* could not be upheld; but that, if the creditor did release one of two sureties, the other would also be discharged. That decision at Law has not since been disputed."

6. Where, by an agreement between bankers, a customer, and a surety, the surety guaranteed the balance due, or to become due, from the customer, subject to a limit, and to a proviso empowering the surety at any time to determine by notice his liability as to subsequent dealings; and the customer afterwards obtained a loan from the bank beyond the limit of the guarantee on a warrant of attorney; and simultaneously with it a second agreement was entered into between the bankers, the customer, and the surety, that the warrant of attorney should not prejudice or affect the former agreement, and that the bank would, at any time when requested by the surety, enter up judgment and issue execution; but the bank omitted to file the warrant of attorney, and the customer became bankrupt; the Court held, that by the omission to file the warrant of attorney the surety was discharged, but that the surety who had pleaded to an action on the guarantee, and then filed a bill for an injunction, had put the bank to unnecessary costs, and could only be relieved in Equity on paying the costs at Law subsequent to the declaration (2).

7. Where two bankers, B. and C., had carried on business under articles of partnership providing that if at the end of five years, for which the partnership was to continue, either partner should wish to carry on the business, and should not take the share of the other at a valuation, the assets should be realised, the debts

(1) 4 Ad. & E. 675.

(2) *Watson v. Allcock*, 4 De G. M. & G. 242.

paid, and the surplus divided; and simultaneously with the execution of the articles, B., as principal, gave to his partner C. a bond, which was executed by L. as surety, to indemnify C. against all loss in respect of the partnership; and the business of the bank was, without consulting the surety, continued by the firm for more than a year after the expiration of the five years, at the end of which time one of the bankers, C., retired, leaving the whole partnership assets in the hands of B., the other banker, by whom the business was continued till B.'s bankruptcy, about three months afterwards; and B. then absconded, leaving the concern insolvent, and C. was compelled to liquidate the liabilities of the partnership; the Lords Justices held, that inasmuch as by the articles of partnership the partnership ought to have been wound up at the expiration of the term limited by the articles, it was not competent to C. to agree to its continuance without the consent of the surety, L., and yet to hold L. liable as surety upon the bond, and that C., therefore, was not entitled to put the bond in force against L.; and the Court held, that by this continuation the surety was discharged, and that, whether that circumstance would afford a defence to an action on the bond or not, a Court of Equity would restrain the obligee from proceeding in such an action (1).

8. In *Dawson v. Lawes* (2) Vice-Chancellor Sir W. P. Wood refused an injunction to restrain an action against the surety upon an interlocutory application, in a state of circumstances not shewing a sufficient probability that such a case would be proved on further investigation as would entitle the surety to be protected by a perpetual injunction at the hearing.

9. Where A., B., and C. had contracted with a company to execute certain works on given terms, and D. and E. had given a bond, as their sureties, for the performance of the contract; and A. and B. retired from the partnership, and F. had been substituted; and afterwards disputes arose between the company and C. and F. as to the conduct of the works, and various transactions took place by which the terms of the contract were varied, and during which the company paid to C. and F. certain moneys which it had been agreed originally should be paid to A., B., and C.; and

If the transactions which vary the position of the surety are known to the surety, he will not be discharged.

(1) *Small v. Currie*, 5 De G. M. & G. 141; 18 Jur. 731; 23 L. J. (Ch.) 746.

(2) 1 Kay, 280.

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D. and E., the sureties, were no parties to these transactions, and gave no express consent; but they had been the solicitors of A., B., and C., in the original contract, and knew of all the subsequent transactions, and acted as the solicitors of C. and F., and as such solicitors prepared many of the documents required for such transactions; and the company having brought an action on the bond against the sureties for breach of the contract, they filed this bill to restrain the action; Vice-Chancellor Sir R. T. Kindersley held—on the ground that the transactions above mentioned, on which the sureties relied for their discharge, were known to the plaintiffs—that the sureties were not discharged, and that the action could not be stopped (1).

A transaction which would otherwise operate as a release of a surety, will not have that effect if the remedy against the surety is reserved.

10. Where A. and B. (principal and surety) had become bound to C. in the payment of £400, of which sum, by an arrangement between A. and B., £120 were paid to the latter; and B. repaid to C. that sum before the time limited by the bond for the payment of the £400; and C. after that time accepted from A. a promissory note payable at two months for the remainder, on a parol agreement (which was proved) that the note was not to be considered as given in discharge of or as substituted for the bond; and A. died insolvent; on a bill filed by B. against C. for a declaration that under the circumstances he was released and discharged from the bond, and for an injunction to restrain C. from proceeding in an action which he had commenced for the recovery of £280, the remainder of the £400; the Court held, that the surety was not discharged, and that there was no case for the interference of a Court of Equity; the Court holding that a transaction which would otherwise operate as a release of a surety will not have that effect if the remedy against the surety is reserved, and that the evidence here shewed that there was such an agreement to reserve the rights against the surety (2).

If the creditor in any way alters the position of the surety with reference to his remedies against

11. A letter written by the agent of a bond creditor to the principal obligor giving him eighteen months further time to pay the bond debt, upon condition of his paying off at once the arrear of interest, and keeping down the interest to accrue in future; was held, by Vice-Chancellor Sir W. P. Wood, upon a suit for an

(1) *Woodcock v. Oxford and Worcester Railw. Co.*, 1 Drew, 521.

(2) *Wylke v. Rogers*, 1 De G. M. & G. 408; 21 L. J. (Ch.) 611.

injunction to restrain an action by the bond creditor against the plaintiff, the co-obligor, upon his liability as a surety, the plaintiff claiming to be discharged from such liability, to be simply a promise, without consideration, that the creditor would not sue the principal debtor for eighteen months longer, which did not bind the creditor either at Law or in Equity; and that he would have been at liberty to sue the debtor the next day; and that there could not be any relief by way of injunction against such action, and therefore that the co-obligor, who had joined in the bond as surety only, was not thereby discharged (1). The Vice-Chancellor said: "It is not every alteration of position that authorizes a surety to come to this Court and claim to be discharged from his liability. There may be many such alterations which do not vary the rights of the surety as against the principal debtor. The real test is, has the creditor in any way altered the position of the surety with reference to his remedies against the principal debtor? If not, then this Court does not interfere." And where the creditor knew that the surety was negotiating a loan for the principal debtor for the purpose of paying off therewith the debt for which the surety was liable, and thus getting rid of such liability, and the creditor promised the debtor to give him further time, and this induced the surety to desist from his attempt to raise the money; the Vice-Chancellor held, that the surety's liability to the creditor was not discharged (2).

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the principal
debtor, this
Court in-
terferes.

12. Where corn-factors supplied flour on credit to a baker, on his executing to them, with a surety, a bond, the condition of which, after reciting that the baker had entered into a contract for the supply of bread to the army, was that the bond was to be void if the baker should deliver to the corn-factors his bills on the government as he drew them, and if he and the surety should make good the amounts to become due to the corn-factors; and the corn-factors supplied flour, but not of the quality specified in the government contract, which was vacated on that account; Lord Chancellor Westbury held, affirming a decision of Vice-Chancellor Sir John Stuart, upon a bill by the surety for an injunction to restrain the obligees from taking proceedings at Law on the bond, that the corn-factors could not against the surety allege ignorance of the

(1) *Tucker v. Luining*, 2 K. & J. 745.

(2) *Ibid*.

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terms of the contract, and that the surety was discharged. But the plaintiff, though successful, was ordered to pay all costs occasioned by unsustained charges in the bill (1).

13. Where a creditor recovered judgment against the principal and surety, levied his execution on property of the principal, and on payment of part of the execution directed the sheriff to restore the property, and gave further time to pay the residue without the assent of the surety; it was held, that the judgment was thereby discharged as to the surety; and that if these facts had been returned on the execution he might have been relieved at Law; but they not having been returned, Equity would enjoin any subsequent execution (2). So where a judgment was entered against the principal and surety in a note, by confession, upon a power of attorney, which provided that no bill in equity should be filed to interfere in any manner with the operation of the judgment entered by virtue thereof; the surety may file his bill in Equity for relief against the judgment, on the ground that he was released by the payee's extending the time of payment to the principal maker, before the entry of the judgment, without the assent of the surety (3).

SECT. 4. *Guardian and Ward.*

1. Where guardian, after his ward attains full age, continues to manage property at the request of the ward, and before the accounts of receipts and payments during the minority are settled, it is in effect a continuance of the guardianship as to the property, and the guardian must account on the same principle as though the transactions were during the minority; therefore an injunction was granted on terms to restrain a guardian from proceeding in an action to recover a balance claimed by him on account of the transactions after his ward had become adult (4).

2. Two years and a half after a young lady had come of age, A., who had been her guardian, and with whom she still resided, drew

(1) *Blest v. Brown*, 4 De G. F. & J. 367; 3 Giff. 450.

(3) *Kennedy v. Evans*, 31 Ill. 250 (Amr.)

(2) *Baird v. Rice*, 1 Call. 18 (Amr.)

(4) *Mellish v. Mellish*, 1 S. & S. 138.

a promissory note payable to the plaintiff or her order, and she, at his request, indorsed it; A. then delivered the note to B., and B. shortly afterwards paid it to or deposited it with his bankers, the defendants, who were also A.'s bankers, and knew that A. was insolvent, and that he had been the young lady's guardian, and they, on the faith of the indorsement, paid a cheque which B. had drawn on them in favour of A., and afterwards purported to discount the note for B. (the Vice-Chancellor observing that it appeared from the bankers' books to be like a transaction of discount), and the defendants claimed to be purchasers and indorsees of the note for value without notice of the circumstances on which the plaintiff relied as freeing her from liability in respect of her indorsement; Vice-Chancellor Sir L. Shadwell restrained the bankers from suing the young lady on the note, and Lord Chancellor Cottenham affirmed this decision, and would not order her to pay the amount of it into Court (1).

SECT. 5. *Husband and Wife.*

1. In *Westmeath (Earl) v. Westmeath (Countess)* (2) the Court refused an injunction to restrain proceedings at Law for recovering an annuity secured to the wife by a deed of separation, although it did not contain any covenant to indemnify the husband from her debts; Lord Chancellor Eldon said that it was impossible for him at that time to take upon himself to say that the deed was not good at Law, and that the parties might, therefore, try the question in such manner as they might be advised, with liberty to apply.

2. Where husband and wife, by a deed of separation, agreed to live separate, the husband to allow the wife an annuity of £200 for their joint lives and twelve months after the husband's death, if the wife survived him; and the trustee of the deed covenanted with the husband that the wife should not molest him, and that she should not seek to compel him to live with her again, or "bring any citation in the Divorce Court for the restitution of conjugal rights;" and the annuity had been duly paid, and the wife commenced proceedings in the Divorce Court for a restitution

(1) *Maitland v. Backhouse*, 16 Sim. 58.

(2) Jac. 126.

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of conjugal rights; upon a bill filed by the husband for an injunction to restrain the wife from further proceedings in the Divorce Court, it was held that the wife ought to be restrained from further proceedings until the hearing, the deed not having been impeached; and the Court granted an injunction, with liberty for the wife to file a cross bill to impeach the deed, or as she should be advised, without filing it in the name of a next friend (1).

3. Where a bill by the husband against a divorced wife and the trustee of her separation deed, stated that after the marriage the wife withdrew herself from the husband, and refused to cohabit with him, whereupon a deed of separation was executed by him, his wife, and a trustee; that the wife in fact left the husband and refused to cohabit with him, in collusion with a paramour, in order that she might more readily have adulterous intercourse with the paramour, and that she fraudulently procured the husband to execute the deed for the purpose of more securely carrying on her adulterous intercourse with the paramour; and that proceedings for *crim. con.*, and in the Divorce Court for dissolution of the marriage, had been successfully prosecuted by the husband; that a large sum was due to him for costs in such proceedings from the paramour; that since the divorce he had made no payment under the deed, and that an action by the trustee had been commenced against him; and prayed that the separation deed might be declared void as against him; Vice-Chancellor Sir W. P. Wood allowed a demurrer to the bill (with liberty to amend) for want of equity, on the ground that the subsequent divorce gave no jurisdiction to this Court to deal with the settlement. But the Vice-Chancellor said that he thought it a question open to discussion as to how far the representations of the late wife, in concert with her paramour, would be enough to set aside the deed, but that that question did not arise on these pleadings (2).

4. Where a married woman was entitled, under a will, to a legacy charged on land, with power of entry and receipt of rents and profits, the Court held, that this power did not deprive the legacy of its equitable character, so as to enable the husband to assign it free from the wife's equity to a settlement, but that the Court

(1) *Kitchin v. Kitchin*, 19 L. T. (N. S.) 674.

(2) *Evans v. Carrington*, 6 Jur. (N. S.) 268.

would, at her suit, and on the devisee paying the legacy into Court, restrain the husband's assignee from enforcing the legal remedies for the recovery of the legacy (1).

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SECT. 6. *Attorney and Client.*

1. Where an injunction is granted against proceedings at Law, on an instrument obtained either as a gift or purchase, in fraud of the fiduciary situation of the donee or purchaser, the Court will not impose the terms of paying the money into Court, if the relationship be that of attorney and client (2). In this case a solicitor allowed an annuity to be granted to his wife by his client, under circumstances shewing that the client was under undue influence on the part of the solicitor; the latter was restrained from enforcing the payment of the annuity at Law, all the Barons of the Exchequer concurring.

2. Though the Court will open a solicitor's bill, and order taxation after several years, and a security given, or even payment, upon gross errors, fraud, or undue pressure; yet where nothing appeared but a trifling inaccuracy, and no fraud, imposition, or material error was established, the Court would not restrain proceedings upon a security (in this case a bond) merely because business was still depending when it was obtained (3).

SECT. 7. *Solicitors' Bills (Taxation of).*

1. The Court will restrain a solicitor whose bill has been taxed and more than one-sixth taken off, from bringing an action against his client before the costs of taxation have been ascertained for the amount so taxed (4). And so, where the action has been commenced before the taxation, proceedings in the action will be restrained under the same circumstances (5).

(1) *Duncombe v. Greenacre*, 29 Beav. 578; 2 De G. F. & J. 509; 6 Jur. (N. S.) 987; 8 W. R. 657; *vide* S. C. p. 630, *ante*.

(2) *Goddard v. Carlisle*, 9 Price, 169.

(3) *Cooke v. Setree*, 1 V. & B. 126, *vide In re Woodard*, 17 W. R. 1006;

and see the 6 & 7 Vict. c. 73, and the 33 & 34 Vict. c. 28; the Attorneys and Solicitors Acts, as to restraining actions or suits on, and taxation of solicitors' bills of costs.

(4) *Barr v. Wiggins*, 4 Sim. 125.

(5) *Walton v. Johnson*, 2 Sim. 456.

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2. The omission by a client to fill a certificate of taxation of a solicitor's bill within the four days prescribed by the Order of the 29th of October, 1692 (1), was held not to render the order a nullity; and it was held that the client's representatives, after his death, might, notwithstanding the omission, obtain an order, under the summary jurisdiction of the Court, for the delivery up of the client's papers on payment of the amount of the bill as taxed; and an action by the solicitor on the bill, after such taxation, was held to be a contempt ("a high contempt," *per* Lord Justice Turner), and restrained by injunction, at the instance of the representatives (2).

SECT. 8. *Receiver—Officers of the Court.—Auctioneer (under sanction of the Court).*

1. Where there was no good reason to suppose that a receiver had acted maliciously or *malâ fide*, or that any substantial damage had been sustained, the Court restrained an action of trespass brought by the defendant, and granted the usual reference to the Master. The receiver in the cause had, in this case, distrained for rent due by a tenant who held in reality for the defendant, as it was alleged by the defendant, on lands in the possession of the defendant, and not those over which the receiver had been appointed (3).

2. In *Randfield v. Randfield* (4), upon an application to the Court by the lord of the manor for liberty to enter and take the profits of a copyhold estate which was in the possession of the Court by its receiver, the lord claiming to be entitled to seize the estate for default of an executory devisee coming to be admitted; Vice-Chancellor Sir R. T. Kindersley, being of opinion that the devisee was not bound to take admittance, refused the application, with costs; from which order there was an appeal. Upon which Lord Justice Turner said, that decision appeared to him to be exceedingly strong, for there could be no doubt that if the Court was not in possession of the estate by its receiver, the lord would

(1) Sanders' Orders, p. 397.

(2) *Campbell, In re*, 3 De G. M. & G. 585; 22 L. J. (Ch.) 865.

(3) *Parr v. Bell*, 9 Ir. Eq. Rep. 55.

(4) 3 De G. F. & J. 771.

be entitled to seize, in order to try the question whether the devisee was bound to take admittance or not; and that it was not, as he apprehended, according to the course of the Court to refuse liberty to try a right which was claimed against its receiver unless it was perfectly clear that there was no foundation for the claim; that the Vice-Chancellor's decision went, therefore, the full length of saying that the lord had no possible claim; and that His Honour, indeed, had so put the case in giving judgment; that he was certainly not prepared to go that length; and, upon an agreement of the parties that the question should be tried before the Court of Appeal in Chancery instead of at Law, Lords Justices Knight and Turner held, that the lord was entitled to require the persons claiming under the executory devise to come in and be admitted; and that unless some arrangement could be made for payment of the fine, leave must be given to the lord to seize *quousque*.

3. Where, from the circumstances, it appeared impossible to make out a case for damages for an irregularity committed by the messenger of the Court, the Court granted an injunction to restrain a party from proceeding in an action of trespass brought against the messenger, and ordered the plaintiff at Law to pay the costs of the application (1).

4. In *Re Weaver* (2), on a petition by the committees of the lunatic's estate, the Court made an order to restrain an action brought by an auctioneer against the solicitor in a lunacy, for the amount of his bill for appraising and selling property belonging to the lunatic, such sale having been made under the authority of the Court and the auctioneer having acted on the instructions of the solicitors, and with the sanction of the Master before whom he had at first carried in his claim; and a reference was directed for the purpose of ascertaining what would be a proper sum to be allowed him on that account, the question of costs being reserved.

5. In *Maackay v. Bluckett* (3) it was held that where process has been set aside for irregularity, the officer or party desiring the protection of the Court for acts performed under such process must apply promptly; and that the application comes too late after judgment against him for such acts.

(1) *Chalie v. Pickering*, 1 Keen, 749.

(2) 2 My. & Cr. 441.

(3) 9 Paige, 437 (Amr.)

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SECT. 9. *Lunacy.*

1. An order in lunacy directing the taxation of the costs, charges, and expenses incurred by the solicitors employed in prosecuting the commission in lunacy, and subsequently as the solicitors of the committees, and directing an inquiry whether it would be fit and proper to raise these costs, &c., by sale or mortgage of the lunatic's real estate, does not constitute them a judgment debt, nor make them a charge in equity upon such real estate; but such costs, &c., were considered as a simple contract debt due by the lunatic for necessities; but the lapse of six years during the lunatic's life will not bar a debt of this description, for the Court of Chancery will take judicial notice in a suit to obtain payment out of his assets after his death, that any action against the lunatic for the recovery of the claim would have been restrained by the Lord Chancellor on petition in Lunacy (1).

This Court will take judicial notice in a suit to obtain payment out of a lunatic's assets after his death, that any action against the lunatic for the recovery of a debt due for necessities would have been restrained.

2. Where, in 1823, an action was brought upon a promissory note, and the debtor was arrested, and soon afterwards the debtor was declared a lunatic; and in 1825 he, by his committee, filed a bill to restrain the action; and in July, 1825, an arrangement was made, and carried into execution by an order of this Court, whereby the action was stayed, and the creditor agreed to establish, and did proceed to establish, his debt under the lunacy; and in 1843, however, and before the Master acting in the lunacy had made any report as to the creditor's claim, the lunatic died, and the creditor then filed his bill against the lunatic's executors; the Court held, upon demurrer, having no judicial knowledge of the effect of the death of the lunatic upon the proceedings in the lunacy, that the claim of the plaintiff was not barred by lapse of time (2).

SECT. 10. *Executor—Administrator.*

1. The Court will not permit the executor, after the estate has been fully administered in the Court, without leave, to prosecute an action against a party to the suit for recovery of part of the

The Court will not permit an executor, after the

(1) *Stedman v. Hurt*, 1 Kay, 607.

(2) *Rock v. Cooke*, 1 Coll. 477; 3 Jur. 1005.

testator's estate. And where a creditor of a testator had filed a bill against the executor for administration, and had obtained an injunction and a receiver, the plaintiff having been found a creditor, and the cause heard on further directions, the injunction, and receiver not being continued, the Court, by injunction, summarily restrained the executor, who afterwards brought an action at Law against the plaintiff for moneys due to the testator (1).

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estate has been administered in Court, without leave to prosecute an action against a party to

the suit for recovery of part of testator's estate.

2. Where there was evidence that an intestate had requested a debtor to him to hold the sum due in trust for the plaintiff, and that the debtor had accepted the trust, and had paid over a part of the fund to the plaintiff, the Court granted an injunction upon motion to restrain, until the hearing of the cause, an action which had been brought by an administrator to recover the debt (2).

Administrator restrained prosecuting an action to recover a debt where there was evidence that the intestate had created a trust of the fund due by the debtor which the debtor had accepted.

3. A demurrer was allowed to a bill by the Bank of England for an injunction against the action of an executor claiming a transfer of stock; the Bank considering the stock as specifically bequeathed (which was doubtful) to trustees in France, upon special trusts. Lord Chancellor Eldon said, that "if the executor could not maintain the action the plaintiff did not want the protection of this Court; if he could maintain an action, then the true construction of the 1 Geo. 1, st. 2, c. 19, ss. 11, 12, authorizes or does not prevent that action, and if so, there was no equity" (3); and it has since been determined that, though there be a specific bequest of stock, the Bank cannot refuse to permit the executor to transfer it, he not having assented to the legacy; and the Bank having, under these circumstances, refused to permit the executor to transfer, on a bill filed by the executor to compel the Bank to permit the transfer, the Master of the Rolls decreed it to do so, with costs (4).

The Bank of England cannot refuse to permit an executor to transfer stock, though specifically bequeathed.

4. Where a bill stated that the plaintiff was legatee under a will of which the defendant was executor, that the usual decree for an

(1) *Oldfield v. Cobbett*, 5 Beav. 132; 6 Beav. 515.

(2) *M'Fadden v. Jenkyns*, 1 Hare, 458; 1 Ph. 153.

(3) *Bank of England v. Lunn*, 15 Ves. 569.

(4) *Franklin v. Bank of England*,

1 Russ. 575; 4 L. J. (Ch.) 214. In a note to this case in Mr. Russell's report it is stated that an appeal was then pending, but there appears to be no mention of the case in the reports of the proceedings in the House of Lords.

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account of the personal estate had been made, and that the Master had charged the plaintiff with several articles of the personal estate possessed by him; that the account between them being afterwards referred to an arbitrator, he found a small sum in favour of the plaintiff, but never made an award; that after that, the defendant, as executor, brought an action against the plaintiff for the effects of the testator so in his possession; and the bill prayed an injunction to restrain the defendant from proceeding at Law, and that the value of the articles possessed by the plaintiff might be deducted out of the interest taken by him under the will; the Court thought upon this case that the plaintiff was entitled to an injunction till the Master made his report, and a demurrer for want of equity was, therefore, overruled (1).

An executor who pleaded *plene administravit*, and verdict against him, obtained an injunction against further proceedings at Law upon proof that the asset appeared afterwards to be worthless.

5. An executor pleaded *plene administravit*, and the verdict was had against him on producing the executor's own letter, confessing as due a mortgage made to the testator for £300; the executor afterwards, on a bill, proving in Equity, that this mortgage appeared afterwards to be worth nothing, and that there were two prior mortgages upon the same estate, was relieved after a verdict at Law against him, by an injunction to stay the proceedings at Law; and the Court directed an account of the assets, and on payment of what should appear due to the defendant to acknowledge satisfaction of the judgment (2). Where a decree had been obtained in a creditor's suit in April, 1844, and on the 25th of May following a judgment obtained by default in April, 1843, by a creditor against an executrix, was set aside on the terms of the executrix pleading *plene administravit*, and on the 3rd of June, on the eve of the trial, the executrix moved for an injunction; the Court granted the same, to stay execution only, and afterwards refused to permit the creditor to proceed against the executrix for the purpose of charging her personally (3).

Executor relieved against a verdict after pleading *ne unques* executor, on a chimney

6. In *Robinson v. Bell* (4), Lord Commissioner Hutchins cited a case in Lord Bacon's time, where, on an action of debt against an executor for £700, the executor pleaded *ne unques* executor; and on proving at the trial that a chimney back, or some other slight thing, came to the defendant's hands, the plaintiff had a verdict;

(1) *Milner v. Goolden*, 1 Cox, 196.

(2) *Robinson v. Bell*, 2 Vern. 146.

(3) *Kirby v. Barton*, 8 Beav. 45.

(4) 2 Vern. 147.

but Equity relieved against the verdict; and he also cited a case of *Cryer v. Goodhand*, in Lord Nottingham's time, where in an action of debt brought against the widow of an ale-house keeper who died intestate, she pleaded *ne unques* executor, and the plaintiff proved that the defendant had taken money for some few pots of ale sold in the house after her husband's death, and Equity relieved.

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back or some other slight thing only having been proved to have come to his hands.

7. An executor who has obtained probate will not be restrained at the instance of the next of kin from suing for and collecting the debts due to the deceased, though the will may have been impugned in the Ecclesiastical Court in a suit to recall probate; but he will be ordered to bring in the money recovered upon the next of kin (here a pauper) giving security for costs (1).

8. Where A. was at his death indebted to W. in £600, and he directed that after his death his business should be carried on by his executors, and an application was made for payment of the money, and the acting executor in the business subsequently signed *per proc.*, in the name of the old firm, two promissory notes for the amount due; but he had no express or implied authority from his co-executors to do so, and he believed that the estate would be sufficient; but it was afterwards discovered that it was insolvent, and, after an administration decree had been made, W. brought an action upon the notes against the executors to recover the amount due to him; the Lords Justices (reversing an order of Vice-Chancellor Sir J. Stuart, granting an injunction), looking at the course of dealing pursued by the executors, dissolved the injunction to restrain proceedings in the action (2), and held, that where an executor gives bills or incurs liabilities in respect of his testator's estate, and a suit is instituted for the administration of the estate, the Court will not, by a motion in the suit, restrain an action against the executor in respect of such bills or liabilities. Such relief, if to be obtained, must be sought in a distinct suit (3).

Where an executor gives bills or incurs liabilities in respect of his testator's estate, the Court will not, by a motion in an administration suit, restrain an action against the executor; such relief must be sought in a distinct suit.

9. Where a bill-holder had brought an action against the executors of the drawer, and had obtained judgment under the

(1) *Mullen v. Horner*, Hay & J. 398.

(2) *Lucas v. Williams*, 4 De G. F. & J. 436; 8 Jur. (N. S.) 207.

(3) *Id.* 10 W. R. 578, 606.

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18 & 19 Vict. c. 67, before the will was proved by them, they not having applied for leave to defend, and execution had been levied, but before any sale (the executors having in the meantime proved the will) a creditor obtained, on summons, an administration decree in Equity; the Court, held, that the plaintiff in the administration suit was not entitled to an injunction to restrain further proceedings under the execution (1).

10. In *Dickinson v. Molyneux* (2) the Court refused to relieve an executor against an extent in aid taken out by a simple contract creditor against himself, and the debt found, whereby he preferred himself to bond creditors, who had recovered judgment against the executor, though the defendant confessed he was able to pay the king at the time of the extent; but in the report of this case it is stated that not long before, the Court had relieved in a case of such an extent (3).

11. Where a testator, by will, gives or forgives a debt, it is a testamentary act, and will not be good against creditors; but against an executor it may be so; and if an action should be brought for it, the Court will grant an injunction (4). In this case the plaintiff's grandmother, by her will, had forgiven her son-in-law, C., a debt of £500, due to her on bond, which she desired her executors to deliver up to be cancelled; and the legatee died in the life of the testatrix; the Court held that the plaintiff, as representative of C., should have the benefit of the discharge of this debt, and decreed that the bond should be delivered up to be cancelled.

12. Where an administrator of an intestate has joined in giving receipts for moneys effected on policies on the intestate's life, and signed a letter to the office requiring the company to pay the amount to the party who had effected these insurances as securities for moneys advanced by him to the intestate, the Court will restrain an action commenced by the administrator for the recovery of these moneys so received (5).

(1) *Marriage v. Skiggs, In re Skiggs*,
4 De G. & J. 4.

(2) *Proc. Ch.* 47.

(3) *Alderman Sturt's Case*, *Proc. Ch.*
47.

(4) *Sibthorp v. Moxom*, 3 Atk. 581;
S. C. sub. nom. Sibthorp v. Moxton, 1
Ves. Sen. 49.

(5) *Andrewes v. Jones*, 12 L. T.
(N. S.) 229.

13. An administrator, who had failed to plead because advised that his plea would not avail, and had afterwards discovered facts which made his plea good, was held to be entitled to relief against judgment on default, as he was obliged, from the nature of his office, to rely upon information (1).

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14. Where Equity has taken jurisdiction over the estate of a deceased person, for the purposes of settlement, it will restrain by injunction an action against the administrator, on his bond, for an alleged breach of duty. If the suit was commenced before the decree or an account was entered, the order will be to stay its further prosecution; but if commenced afterwards, the suit may be dismissed (2).

SECT 11. *Heir Expectant—Heir at Law.*

1. In *King v. Hamlet* (3) an injunction was refused, by the House of Lords and Lord Chancellor Brougham, to restrain a tradesman from suing on securities for the price of goods sold to an expectant heir, with the knowledge that the purchaser intended to sell them for the purpose of raising money, and the bill was dismissed; the prices for the goods being fair and reasonable, and the transaction known to the party in possession of property, the reversionary interest in which was mortgaged at the same time by the expectant heir, then under pecuniary pressure, which party stood *in loco parentis* to the heir, and the heir having subsequently allowed the consideration given for the securities to be so dealt with that it could never be restored to the other party in its original condition, and also not being able to shew a continuance of the pressure compelling him to act as he did.

Injunction refused (here) to restrain an action on securities for the price of goods sold to an expectant heir, with the knowledge that the purchaser intended to sell them to raise money.

2. Where, pending a suit for the establishment of a will of real estate, the heir at law, who had concurred in the will and in the establishment of the suit, had commenced actions of ejectment and detinue to recover the estate and title deeds, the Court, on the

(1) *Hewlett v. Hewlett*, 4 Edw. Ch. 7 (Amr.)

(3) 3 Cl. & F. 218; 9 Bli. (N. S.) 575; 2 My. & K. 456; Coop. t. Brough.

(2) *Washington v. Emery*, 4 Jones, Eq. 32 (Amr.)

281; 4 Sim. 223.

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application of the trustee, referred it to the Master, to inquire what proceedings ought to be taken to defend the actions; and restrained the actions in the meantime (1).

SECT. 12. *Indictments.*

1. Where the agents of the receiver in a cause, acting under leave of the Court, had taken forcible possession of a house occupied by a servant of one of the defendants, the Court made an order restraining that defendant from prosecuting an indictment against the agents (2).

(1) *Edgecumbe v. Carpenter*, 1 Beav. 171; 8 L. J. (N. S.) Ch. 17.

(2) *Turner v. Turner*, 15 Jur. 218.

CHAPTER VI.

CORPORATIONS.

PART II.

1. The Court of Appeal, on the ground that there was a very important and substantial question for decision at the hearing, extended an injunction which had been granted by Vice-Chancellor Sir W. P. Wood (1) (who had restrained a judgment creditor of a board of guardians, in respect of a debt incurred prior to the year for which a rate had been raised, from levying upon money in the hands of the treasurer, or upon goods purchased since the commencement of the year for which the rate was raised), against the levying writs of *fi. fa.* and *elegit*, and from levying execution against the goods, chattels, lands, hereditaments, moneys, and property of the board, as prayed by a bill and information filed by the Attorney General and the board of guardians of the poor of the City of London, against the judgment creditor and sheriff of London and Middlesex.

(1) *Att.-Gen. v. Wilkinson*, 5 Jur. 7 W. R. 301; 7 Jur. (N. S.) 301; 32 (N. S.) 538; 28 L. J. (N. S.) Ch. 392; L. T. 386; 29 L. J. (Ch.) 41.

CHAPTER VII.

COMPANIES.

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1. Under a voluntary winding-up by a special resolution passed for the winding up of a company, under the provisions of the 25 & 26 Vict. c. 89, ss. 129, 138, the Court has jurisdiction, and, as in this case, by motion on behalf of the official liquidator, to stay by an injunction proceedings in actions by creditors commenced against the company after the passing of such a resolution; but upon granting the injunction to stay such action by a creditor against a company during a voluntary winding-up, the Court, on the ground that the winding-up was not being carried on under the control of the Court, and that it had no means of knowing what funds were being provided for the creditors, required the liquidators to give the creditors access to the proceedings, and gave to the creditor his costs (such costs to be added to his debt) down to the time he had notice, in this case by a circular forwarded to all the creditors of the company informing them of the winding-up (1). And so, where during a voluntary winding-up, an action had been brought against the company on bills of exchange, the Court stayed execution only, and directed the costs to be added to the debt (2); and a creditor who commenced an action and signed judgment after a resolution (of which he had notice), passed and duly confirmed, to wind up voluntarily a limited company, was restrained from issuing execution (3). But where an order for winding up a company has been made by the Court of Chancery, a judge sitting at nisi prius will not stop further proceedings in an

(1) *Keynsham Company, In re*, 33 Beav. 123; 9 Jur. (N. S.) 885.

(2) *Peninsular Banking Company, In re*, 35 Beav. 280.

(3) *Sablottière Hotel Company, In re*, L. R. 3 Eq. 74.

action after the cause has been called on and the jury sworn (1); and the Court will restrain a creditor of a company which is being wound up voluntarily from proceeding with an action commenced prior to the resolution for winding up, upon the terms of the creditor adding to his debt all costs incurred up to the time of his receiving notice of the winding-up (2). But where after a writ of summons by creditors against a company had been served, but before judgment a petition for winding up was presented, and the creditors had no notice of the petition, and obtained judgment, and a writ of execution was issued, and the sheriff took possession before the order for winding up was made, a motion for an injunction to stay proceedings under the execution was refused by the Court by virtue of the discretion which it has under the 87th and 163rd sections of the Companies Act, 1862, but the creditors were put upon terms in regard to the description of property to be taken (3). But in a subsequent case (4), where, at the time of the presentation of a petition to wind up a company, the sheriff was in possession of the property of the company under executions issued at the suit of several judgment creditors, and after the petition was presented, the Court, upon the *ex parte* application of the petitioner, restrained the sheriff from selling the property until after the hearing of the petition; after making an order for a compulsory winding-up, Vice-Chancellor Sir R. Malins, following a case of *The Leeswood Iron Company*, before the Master of the Rolls (Lord Romilly) on the 15th of November, 1866, ordered the sheriff to deliver up the property to the official liquidator, to be sold in the winding-up, reserving to the creditors the same priorities against the proceeds of the property seized by the sheriff on their behalf as they would have had if it had been sold by the sheriff; however, where a creditor of a limited company (but never registered under the Companies Act, 1862) had obtained judgment, and seized the goods of the company by a *bonâ fide* execution, eight days before a petition for winding up the company was presented, it was held, by Lords Justices Knight Bruce and Turner,

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(1) *Henderson v. Peruvian Railw. Co.*, 16 L. T. (N. S.) 297.

(2) *Life Association of England*, *In re*, 10 Jur. (N. S.) 762.

(3) *In re Bastow & Co.*, L. R. 4 Eq. 681; 15 W. R. 1033.

(4) *Plas-yn-Mhowys Coal Company*, *In re*, L. R. 4 Eq. 689.

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reversing a decision of the Master of the Rolls (Sir J. Romilly), that the Court, in the exercise of its discretion, under the 25 & 26 Vict. c. 89, s. 201, would not restrain the creditor from proceeding to a sale; and (*per* Lords Justices Knight Bruce and Turner) where an execution has been perfected by seizure before the presentation of a petition for winding up, *quære* whether the Court has jurisdiction under the 201st section of the Companies Act, 1862, to restrain a sale; and (*per* Lord Justice Turner) in such a case it is not a "putting in force of the execution" within 25 & 26 Vict. c. 89, s. 163. In this case the sheriff had been served with notice of the original motion but not with notice of the appeal; the Lords Justices held that he was entitled to the costs of his appearance in the Court below, but not to any costs on the appeal (1). But where a judgment creditor of a company issued a *fi. fa.* against the effects of the company, but before execution had been levied a winding-up order had been obtained and an official liquidator appointed, the Court granted an injunction to restrain the creditor from proceeding to execution (2).

2. Where an incorporated company was improving a harbour under the powers of an Act, whereof the provisions of the Lands Clauses Consolidation Act, 1845, were made part, and in the course of the works a coffer dam had been made, which temporarily prevented ships from approaching so near the warehouse adjoining the harbour as they had been accustomed to do, and a lessee of such warehouse claimed compensation for the damage thus occasioned to him to the amount of £65, or to have the same ascertained by arbitration; Lords Justices Knight Bruce and Cranworth, reversing a decision of the Master of the Rolls, refused to grant an injunction restraining him from proceeding under the compensation clauses of the Lands Clauses Consolidation Act, sect. 68, until he had established his right at Law (3).

3. Where certain persons, as directors of an intended joint stock company, agreed to purchase mines, and articles of agreement

(1) *Great Ship Company, In re, Ex parte Parry*, 10 Jur. (N. S.) 3; 33 L. J. (Ch.) 245.

(2) *Waterloo Life Insurance Company, In re*, 31 Beav. 589.

(3) *Sutton Harbour Improvement Company v. Hitchins*, 1 De G. M. & G. 161; 20 L. J. (N. S.) Ch. 489; 21 L. J. (N. S.) Ch. 73; 13 Beav. 408.

were entered into by which the purchasers agreed to pay the vendors the purchase-money by instalments; and it was provided that if the directors should not have received the deposit or instalments from the shareholders in time to pay the purchase-money, they should be allowed six months further time; and a bill was filed by some of the directors to restrain the vendors from suing for the purchase-money, alleging that the plaintiffs only intended to become liable as directors, and to the extent of funds received by them, and not to incur any personal responsibility, and that they had no funds as directors; the Court allowed a demurrer to the bill (1).

4. Where the directors of a railway company agreed to accept a forfeiture or relinquishment of certain shares held by the plaintiff, who was at that time a director, and he accordingly executed a deed-poll relinquishing and transferring such shares to the company, but the forms prescribed by the Act for giving effect to a declaration of forfeiture, or for a purchase of shares by the company, were not observed; and several calls were afterwards made without any claim upon the plaintiff in respect of such shares; upon an action being subsequently brought against the plaintiff for the arrears of calls upon such shares, a bill was filed and the common injunction obtained; but it was held, that the injunction could not be continued except on the terms of the plaintiff suffering judgment in the action, and paying the money into Court (2).

5. Where, on winding up the affairs of a company, the plaintiff, a provisional committee-man, was called upon to pay a stipulated contribution, and declined so to do, and the defendant, a creditor of the company, was put forward to bring an action against him for the amount due to him; the Court, considering the action had not been brought *bonâ fide* for the benefit of the creditor, but to enforce the contribution, upon the plaintiff bringing it into Court without prejudice to any question, continued an injunction to restrain the action (3).

6. Where a company has been amalgamated with, and has handed over its assets to another, and the united company is insolvent, a shareholder creditor of the first company will not be

(1) *Hodgson v. Hancock*, 1 Y. & J. 317. (N. S.) Ch. 253; 1 Railw. Cas. 460.

(2) *Playfair v. Birmingham, Bristol, and Thames Junction Railw. Co.* 9 L. T. 226. (3) *Cutts v. Riddell*, 1 De G. & Sm.

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restrained from enforcing a judgment against a shareholder in the first company and in the amalgamated company (1). In this case the assets of the first company had been assigned to the other company, of which the defendant had not become a shareholder; and not being able to obtain payment of his debt, the defendant gave notice, under the 68th section of the Joint Stock Companies Registration Act (7 & 8 Vict. c. 110), to the plaintiff, a shareholder in the first company, who had become a shareholder in the second or amalgamated company, that he (the defendant) should proceed against the plaintiff individually to recover the debt; but, upon a bill for an injunction by the shareholder so proceeded against, to restrain the proceedings at Law, but without asking for other relief, Vice-Chancellor Sir R. T. Kindersley held, that as a Court of Common Law had full jurisdiction to deal with the case, the injunction must be refused, and with costs.

7. A purchase of Westminster Improvement bonds was held not within the power of directors of a life insurance society, which was constituted by deed of settlement for the purpose of purchasing, selling, and re-selling life, reversionary, and other personal estates and interests, and of advancing money, by way of loan, on personal security, and generally of carrying on the business of life insurance and of an annuity, loan, and reversionary interest society. The directors were empowered by such deed of settlement, at their own absolute discretion, and in the usual and ordinary course of the business of the society, to invest, lay out, or advance at interest, on Government securities, or on such personal or other security as they should think fit and advantageous, and they lawfully might, such moneys, or such parts of the moneys and funds of the society as they should think expedient (2).

8. Where debentures of a company have been issued fraudulently, as between the directors of such company and the person to whom they were issued, a third party, to whom such debentures have been assigned for value, and without notice of the circumstances under which they had been issued, is in no better position than the person to whom they were issued, and must take subject

An assignee without notice of debentures of a company, issued fraudulently as between the directors and the person to whom

(1) *Hardinge v. Webster*, 1 Dr. & Sm. 101; 6 Jur. (N. S.) 88; *vide* S. C. 979, *ante*.

(2) *Athenæum Life Insurance Society v. Pooley*, 5 Jur. (N. S.) 129.

to all the equities which affected such person, unless there have been such dealings between the assignee and the company as might render the latter liable to the assignee, though it would not have been liable to the assignor (1). And where, in a deed of settlement of a company, provisions were inserted empowering the directors to convene extraordinary general meetings, which were to consist of not less than fifty shareholders, holding together 500 shares, and to borrow or raise any sum of money which the meeting should deem expedient, but not to exceed £50,000; and on the 14th of May, 1851, the company was completely registered under the 7 & 8 Vict. c. 110; and on the 16th of May, 1851, a meeting was held, at which it was resolved that the capital stock of the company should be increased from £10,000 to £100,000; and the society at that time consisted of only twenty-nine shareholders, of whom some were infants and under incapacity; and in consequence of this resolution debentures were, notwithstanding the irregularity of the proceeding, issued by the directors; and seven of these debentures were issued in favour of, and were to be given to the defendant, in payment, with shares of the company to the amount of £2000 and a cheque for £4500, for Westminster Improvement bonds; and the debentures were delivered to the chairman of the company for the defendant; and the debentures, after reciting the deed of settlement, and other things purported to be covenants, by the direction and consent of more than two-thirds of the shareholders at a meeting convened for that purpose, on the part of the society, to pay the sums therein named, with interest, to the defendant, and they were signed by the chairman and manager of the company; and the defendant, in October, 1854, transferred the debentures for value to a stockbroker, who, in December, 1854, again transferred them to L., to whom interest was paid by the directors; but upon L. applying for subsequent interest the company declined to pay it, on the ground, as alleged, of fraud, and L. brought an action, in the name of the defendant Pooley, for the interest; and the official manager of the company, against which a winding-up order had been obtained, then filed a bill for a declaration that the debentures so issued were invalid

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issued, must
take them
subject to the
equities which
affected that
person.

(1) *Athenæum Life Insurance Society* (N. S.) 129; 4 Jur. (N. S.) 371; *vide* v. *Pooley*, 3 De G. & J. 294; 5 Jur. S. C. p. 1122, *ante*.

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Persons dealing in the market for debentures of a joint stock company are bound to use reasonable precautions to ascertain the authenticity of the documents they purchase.

against the company, and that they might be delivered up to be cancelled, and for an injunction to restrain the action; Vice-Chancellor Sir J. Stuart held, that the debentures were, upon the evidence, clearly not issued so as to bind the society, and that L., although a *bonâ fide* purchaser for value, without notice of any infirmity affecting such debentures, was not entitled to recover for them as against the great body of the shareholders, and that he ought to be restrained from suing at Law upon them; and that persons dealing in the market for the debentures of a joint stock company were bound to use reasonable precautions in seeing to the authenticity of the documents which they were purchasing; and this decision was affirmed by the Lords Justices, they holding that the shareholders were not bound by such entry and payment, as neither the one nor the other had been communicated to them; and that the debentures could not, therefore, be enforced against the company (1).

9. Where a canal company having power to purchase lands for gross sums, or for annual rent-charges, to be determined by commissioners in cases of disabilities, took possession of the lands of an infant on an agreement with his tenant; and after an award by commissioners of the gross sum or annual rent-charge which ought to be paid, but which award was invalid, no one being party to it who had power to bind the infant's interest, the awarded gross sum was paid by the company to the steward on an agreement for its return if the land were not conveyed to the company on the infant attaining his majority; and no conveyance was executed, and the purchase-money was returned; but the company continued in the use of the land for their canal, paying to the landowner for forty years after he attained his majority a rent of nearly the amount awarded by the commissioners, and the company, also, with his knowledge, purchased the interests of leaseholders in the lands; the Court held that an agreement could not be presumed to have been entered into or ratified by the landowner for a sale of the fee in consideration of a rent-charge, but that an ejectment brought by the landowner, and the intended erection of a bridge by him, ought to be restrained by injunction, on the ground of

(1) *Athenæum Life Insurance Society* (N. S.) 129; 4 Jur. (N. S.) 371; *vide v. Poolcy*, 3 De G. & J. 294; 5 Jur. S. C. p. 1122, *ante*.

acquiescence, the company undertaking to put in force their parliamentary powers (which had not expired) to acquire the land (1).

10. The Court will not restrain one of the promoters of an abortive company from bringing an action for money advanced by him to the other promoters for the purposes of the company (2). One promoter of a company will not be restrained from bringing an action against the other promoters for money advanced to them for the company.

11. Where directors allowed a judgment to go by default against a public company, which a creditor proceeded to enforce against the shareholders, the Master of the Rolls, Sir J. Romilly, held, that the shareholders could not, in the absence of collusion and concert, question, as against the creditor in Equity, the validity of the original debt, or discuss whether the action could have been successfully resisted by the company (3). But, in the same case, where the creditor proceeded to enforce his judgment against several shareholders, the Court considered that he was bound to give credit to one shareholder, whom he sued, for moneys previously received from the others; but the Court would not disturb the appropriation of part of the moneys the creditor had received in payment of his costs of ineffectual proceedings against other shareholders (4). Shareholders cannot, in the absence of collusion, question, as against a creditor, the validity of a debt, in respect of which the directors had allowed a judgment to go by default. A creditor enforcing his judgment against several shareholders must give credit to one for moneys previously received from the others.

12. Where, pending a suit by shareholders of a company on behalf of themselves and all other shareholders, except the defendants, against the company and the directors, seeking to be relieved from calls as improperly made, and after an interim injunction restraining further proceedings for such calls upon payment of their amount into Court, the solicitors of the company and of the directors in the suit, who were cognisant of the transactions of which the bill complained, commenced an action against the company, and allowed them to submit to judgment by default for the balance of their bill of costs, and upon a return of *nulla bona*, proceeded by *sci. fa.* against the plaintiffs; Vice-Chancellor Sir W. P. Wood, held, that the solicitors were properly made The Court will not allow a person claiming to be a creditor to proceed on behalf of one of the parties litigant in a suit to determine, as between them, by hostile proceedings *dehors* the suit, those rights which are the subject of the original litigation.

(1) *Somersetshire Coal Canal Company v. Harcourt*, 2 De G. & J. 596; 24 Beav. 571; 4 Jur. (N. S.) 1, 671; 27 L. J. (Ch.) 625; *vide* S. C. p. 947, *ante*.

(2) *Hamilton v. Smith*, 5 Jur. (N. S.) 32.

(3) *Green v. Nixon*, 23 Beav. 530; 3 Jur. (N. S.) 993.

(4) *Ibid*.

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defendants by amendment — and the Court, inferring from the evidence that it was an object of the action to prevent the prosecution of the suit, restrained them until the hearing of the cause from prosecuting their right under the *sci. fa.* against the plaintiffs, or any other person on whose behalf the bill was filed, until further order; and refused to put the plaintiffs upon terms of giving judgment to the extent of their debt (1). The Vice-Chancellor said: “Such a course of proceeding on the part of the solicitors would interfere with one of the main questions in the original suit, and if shewn to have been adopted in collusion with, or for the purposes of the original defendants, the case would be brought within the principle of *Taylor v. Hughes* (2). The Court will not allow a person claiming to be a creditor to proceed on behalf of one of the parties litigant in a suit to determine, as between them, by hostile proceedings *dehors* the suit, those rights which are the subject of the original litigation; and if he be put in motion by either of the litigant parties, he is treated as one of them, his claim as a creditor is disregarded, he is considered as one of the parties to the suit, and is only entitled to such relief as the whole effect of the suit will give him. For these reasons, I am of opinion that the solicitors have properly been made defendants, and that the case made against them has properly been introduced into this bill by amendment;” and further on the Vice-Chancellor said: “Thus much is clear, that the solicitors, as the legal advisers of the directors, allowed them to submit to judgment by default in an action in which the solicitors, combining in themselves the character of legal advisers of the directors and creditors of the company, were plaintiffs, and then did, in fact, select as their victims (3) those who opposed the views of the directors. I cannot consider that to be a course which this Court will regard as a just exercise of the legal rights of a creditor.”

13. Where a waterworks company had given notice of an intention, under their powers, of taking certain water belonging to the defendant, and an arbitration was commenced, under which, by

(1) *Horn v. The Kilkenny and Great Southern and Western Railw. Co.*, 1 K. & J. 399.

(2) 2 J. & L. 24; *vide* S. C. p. 956, *ante*.

(3) “Select their victims from the contumacious shareholders.”—Lord St. Leonards in *Taylor v. Hughes*, 2 J. & L. 49.

agreement, the company, in April, 1863, was allowed to take and divert the water, but no award was made; and the company afterwards received notice that third parties claimed a rent-charge, issuing out of mills which were supplied by the stream; but in October, 1863, an agreement was entered into between the company and the defendant whereby the former agreed to pay £2500 by way of compensation for the loss of the water, without making any mention whatever of this rent-charge; and the owners of the chief rent served a notice under the Lands and Waterworks Clauses Acts, and an arbitration was commenced, but was not prosecuted, and an abortive attempt at compensation was also made by the defendant; and the contract for the purchase of the right of taking the water not having been completed, in consequence of the incumbrance on the title, the defendant had brought an action for the purchase-money; and the company filed a bill against the defendant for an injunction, which was dismissed, without prejudice to any bill which the company might be advised to bring against the defendant for specific performance, the defendant undertaking to deal with the judgment in the action as the Court should direct (1). Upon a motion for an injunction in a suit for specific performance subsequently instituted, an injunction was granted upon the terms of the defendant bringing the purchase-money into Court (2).

14. The Court will not entertain any application, under s. 89 of the Companies Act, 1862, to stay proceedings, unless the person applying admits himself to be a contributory, and it is not sufficient that he is described as an "alleged contributory" (3). The motion in this case having been made on behalf of two shareholders so described to stay winding-up proceedings under the above-named section.

The Court will not entertain any application to stay winding-up proceedings unless the applicant admits himself to be a contributory.

15. A private individual, who is a defendant in the same suit with a joint stock company, against which a winding-up order has been made, but no application has been made under s. 87 of the Companies Act, 1862, for leave to proceed with the suit, is not entitled to have further proceedings stayed (4). Vice-Chancellor

(1) *Stockport District Waterworks Company v. Jowett*, 12 L. T. (N. S.) 720; vide S. C. p. 943, ante.

(2) *Ibid.*

(3) *In re Continental Bank*, 15 W. R. 548.

(4) *Wells v. Estates Investment Company (Limited)*, 15 W. R. 762.

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Sir W. P. Wood said that the section did not stop the suit against any one but the company, and dismissed the motion with costs.

16. Any application for leave to continue proceedings against a company in process of winding-up, must be made in that branch of the Court in which the winding-up order has been pronounced, and not to that in which the proceedings have been instituted (1).

17. Where, by a written agreement, the directors of a company agreed to transfer to A. 675 fully paid-up shares in the company, as a security for moneys advanced by him on their promissory notes, and they subsequently registered him as the owner of 675 partly unpaid shares, and being threatened with an action by judgment creditors of the company, he applied to the Court to rectify the register, and restrain the judgment creditors from proceeding against him at Law; Vice-Chancellor Sir W. P. Wood held, that the company had no authority to place him on the register in any other capacity than as the holder of fully paid-up shares (2).

18. The Court has jurisdiction, under the Companies Act, 1862, ss. 87, 163, to permit a distress for rent to be made on the property of the company in possession of the official liquidator appointed under a winding-up order; but the Master of the Rolls (Ireland) refused to do so in the present case, on the ground that the rent had all accrued due before the premises had come into the possession of the official liquidator; and also because under an alleged bill of sale, if it stood, the property was not the official liquidator's at all (the official liquidator was ordered his costs out of the estate, and no order as to costs against the landlords, the petitioners) (3).

19. Where the liquidators of a company being wound up first voluntarily, and afterwards under the supervision of the Court, subsequently to the orders for winding-up sued a shareholder upon certain guaranties given by him to the company, but the action failed, and the shareholder did not pay his attorney the costs of the action, but proceeded to sign judgment for the amount of his taxed costs of the action, and to levy execution against the company; and the liquidators obtained from Vice-Chancellor Sir

(1) *Wilson v. Natal Investment Company*, 36 L. J. (Ch.) 312. *Somerset Railw. Co.*, 15 L. T. (N.S.) 561.
(3) *In re Kingstown Royal Marine Hotel Company*, 15 W. R. 978 (Ir.)

J. Stuart an injunction to stay execution, on the ground that the shareholder owed to the company in respect of calls an amount larger than the costs; Lord Justice Cairns, reversing the decision of the Vice-Chancellor on appeal, held, that the attorney was entitled to a lien on the judgment for satisfaction of the costs due from his client, against which the company could not set off the sum due for calls (1).

20. The fact of a contrary decision in a different, though an analogous case, having been pronounced by a judge of co-ordinate jurisdiction, since the order from which it is desired to appeal was pronounced, is not a sufficient ground on which the Court of Appeal will exercise its discretion of extending the twenty-one days limited by s. 124 of the Companies Act, 1862, for appealing from orders made under that Act (2); in this case the Master of the Rolls refused an application by the liquidator of a company, which was being wound up voluntarily, for an injunction to restrain a creditor from selling goods of the company which he had taken in execution, and more than three weeks had elapsed without the liquidator giving notice of his intention to appeal; but an injunction having, in an analogous case, been granted by Vice-Chancellor Sir J. Stuart, the liquidator applied for leave to appeal, notwithstanding the delay, but the Court of Appeal refused the motion, with costs.

21. Where H. recovered judgment against a company, and afterwards obtained a garnishee order against S., an alleged debtor to the company, who subsequently denied that he was indebted to the company, and H. then, by leave, brought an action against S., and, pending the proceedings, the company was ordered to be wound up, and a liquidator was appointed; a motion by the liquidator for an injunction to restrain the proceedings at Law, was refused, but it was ordered that in case H. should recover a verdict, there should be an injunction to restrain him from putting in force any attachment, sequestration, distress, or execution against the estate or effects of the company in the hands of S. (3).

22. Where the plaintiff applied for shares in a joint stock com-

(1) *Ex parte Smith, Re Bank of Hindustan, &c. (Limited)*, 17 L. T. (N. S.) 339; 16 W. R. 170.

(3) *United English and Scottish Life Insurance Company, In re*, L. R. 5 Eq. 300.

(2) *Ex parte Mitchell*, 36 L. J. (Ch.) 337.

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pany, subject to the Companies Clauses Act, 1845, which were accordingly allotted to him, and he paid the allotment money, and his name was entered on the register of shareholders; and after the allotment the company sent him scrip certificates, transferable by delivery, with a statement that the allottee or bearer would be entitled to exchange them for share certificates; and the plaintiff sold his right to the shares to a purchaser, and delivered him the scrip certificates, but executed no transfer of the shares, and the purchaser gave notice to the company of the sale, and paid some calls on the shares; and the company afterwards made other calls, and demanded payment from the plaintiff, and ultimately brought an action against him for them, and the plaintiff filed his bill to restrain the action; Lords Justices James and Mellish held, reversing a decision of Vice-Chancellor Sir J. Stuart, that the shares did not pass by the delivery of the scrip certificates, and that the plaintiff was not discharged from his liability as a shareholder (1).

If a winding-up petition is about to be heard the Court will restrain actions upon a motion *ex parte*.

23. If a winding-up petition is about to be heard (in this case on the petition day following the application), actions commenced by creditors against the company, and who were about to commence further proceedings, will be restrained on a motion *ex parte* on behalf of the petitioners (here shareholders and creditors), until after the petition has been disposed of, on the applicants giving the usual undertaking as to damages (2).

24. An official liquidator will be removed who insists on prosecuting an action contrary to the wishes of the majority of creditors, where it is certain that there will be a deficiency of assets (3).

(1) *McEuen v. West London Wharves and Warehouses Company*, L. R. 6 Ch. 655; 40 L. J. (Ch.) 471; 19 W. R. 837; 24 L. T. (N. S.) 123.

(2) *In re London and Suburban Bank (Limited)*, 19 W. R. 950. The Vice-Chancellor, Sir J. Wickens, made the above order upon the authority of the following unreported cases, mentioned upon the application, in which similar

orders had been made *ex parte*: *Bristol and Forest of Dean Coal Company* (M. R. May, 1863); *Exhall Mining Company* (M. R. March, 1864); and *Macclesfield Brewery Company* (V.-C. M. July, 1869); *Blakely Ordnance Company* (M. R.)

(3) *Re Tavistock Ironworks Company*, 19 W. R. 672; 24 L. T. (N. S.) 605.

CHAPTER VIII.

INJUNCTIONS GENERALLY.

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1. The Court in *Talleyrand v. Boulanger* (1), while stating that it was not prepared to say how far it would finally give redress, granted an injunction against proceedings at Law on securities, bills of exchange, &c., on the ground that they were obtained by duress by one French emigrant against another, by arresting him when about to sail on an expedition against France, and under an obligation entered into in France as surety, which, according to the law of France, could not affect the person.

The Court restrained proceedings at Law on securities obtained by duress by one resident foreigner from another, under an obligation entered into in the country of the parties.

2. In *Blake v. Blake* (2), where, upon a bill to set aside certain deeds relating exclusively to property in Ireland, and asking for an injunction to restrain the defendants from taking proceedings to oust the plaintiff from receiving the rents and profits of the unsold part; and the plaintiff resided at Boulogne, though stated in the bill to be resident in London, and the defendants in Ireland; and a contract had been entered into at Boulogne for the sale of some of the land to the defendants; and leave had been obtained to serve the defendants out of the jurisdiction, and a receiver had been appointed by the Court of Chancery in Ireland; the defendants put in a plea that the plaintiff was not at the time of filing the bill, and was not then, resident in London, but was and was then resident at Boulogne; that the defendants were not and were not then resident within the jurisdiction of the Court; and that the land was situate in Ireland; Vice-Chancellor Sir R. Malins said, that he had no doubt that when persons who were resident here entered into a contract, though the subject-matter of the contract was abroad, yet that the contract might be sustained; but that it appeared to him that when neither party had anything to do with this country, and the subject-matter was not situate here, as in the present instance, if he overruled this plea the Court might as well

(1) 3 Vcs. 447.

(2) 18 W. R. 944.

PART II.
CHAP. VIII.

The Court will not interfere where plaintiff and defendant are foreigners and both residing out of the jurisdiction and the land, the subject-matter of the suit, is in a foreign country.

be able to interfere in the affairs of all countries. Two Frenchmen might come here to have their disputes decided. Ireland for this purpose was a foreign country. They had a Court of Chancery of their own. Though it had been said that this was not a suit to recover land, yet the effect of it was to recover an estate. The land being in Ireland, and the defendants resident there, was sufficient, in his opinion, to shew that the bill ought not to have been filed here, and allowed the plea.

3. A party will not have lost his right in Equity by setting up a defence at Law by an equitable plea, which was demurred to in such a way as to leave the equitable ground untouched (1). The 83rd section of the 17 & 18 Vict. c. 125, giving a right to plead an equitable defence, is only permissive, and is optional, not compulsory, and a defendant at Law who has not chosen to exercise his option of putting in an equitable plea, although the question might be more proper for the decision of a Court of Law, may come for an injunction to restrain the action, as he might have done before that Act (2). If a party submits his legal rights to the jurisdiction of a Court of Equity, he is not entitled to proceed at Law; but the fact that such a party has pleaded an equitable defence at Law does not here preclude him from filing his bill to restrain the action, as the 83rd section of the 17 & 18 Vict. c. 125, referred to a defence based upon the principles which governed a Court of Equity, and not, as here, upon its forms and practice. In this case A. obtained against B. a decree for specific performance of an agreement, and having sustained damage by reason of the breach of the agreement, A. brought an action at Law for damages for the breach. B. pleaded the proceedings, by way of equitable defence at Law, under sect. 83 of the 17 & 18 Vict. c. 125, but the plea was overruled. B. then filed a bill in Equity against A. for and obtained an injunction to restrain his action (3). Where an auctioneer in an action pleaded equitable pleas of set-off under the Common Law Procedure Act, and the plaintiff at Law replied, and the defendant at Law then filed a bill for an injunction, setting

(1) *Evans v. Bremridge*, 8 D. M. & G. 100.

(2) *Gompertz v. Pooley*, 4 Dr. 448; (3) *Prothero v. Phelps*, 7 D. M. & G. *Kingsford v. Swinford*, 5 Jur. (N. S.) 722; vide S. C. p. 1118, *ante*. 261.

up the same case as in his defence at Law, but alleging also complicated accounts, it was held, that there being nothing to shew that these accounts could not be taken at Law, and that the pleas must be considered as shewing a good defence at Law under the Procedure Act, 17 & 18 Vict. c. 125, that the injunction must be refused. In this case the auctioneer had been employed to sell the property of a lunatic by the agent of the committee, and an action had afterwards been brought by the personal representative of the lunatic against the auctioneer for the moneys received by him as the produce of the sale (1). Where the plaintiff, in an action against himself in respect of rent and dilapidations of certain premises held by him as tenant of the defendants had applied to the Common Law Court for leave to plead an equitable plea under the Common Law Procedure Act, which had been refused; upon the plaintiff then filing his bill and moving for an injunction to restrain the action upon the same grounds as those contained in his plea, namely, that there was an agreement for the surrender of the lease, the injunction was granted, but upon the terms of the plaintiff paying into Court the amount for which the action was brought (2).

4. An injunction to stay proceedings at Law will be granted on the application of some only of the defendants at Law (3).

5. *Seemle*, that in a bill of discovery in aid of an action a *prima facie* case must be shewn, and the Court will not allow a contest on affidavit on a motion for an injunction to restrain an action until full discovery is given (4).

6. If the question is concluded by a judgment of the House of Lords, an injunction will be refused. And where the House of Lords had dissolved an injunction, granted by the Master of the Rolls, to restrain a Scotch company, having agents and property within the jurisdiction, from proceeding in the Court of Session in Scotland to recover a debt against the estate of a testator, who had died domiciled in England, but leaving assets in England and

(1) *Farebrother v. Welchman*, 3 Dr. 122; 24 L. J. (N. S.) Ch. 410; 1 Jur. (N. S.) 126.

(2) *Magnay v. The Mines Royal Company*, 3 Dr. 130.

(3) *Croskey v. European and American Steam Shipping Company, Oakford v. Same*, 1 J. & H. 108.

(4) *Harris v. Collett*, 26 Beav. 222.

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Scotland, which were being administered in a suit in this country, to which the company was not a party, and the executors afterwards instituted another suit in this country against the company for an account of all dealings between the company and the testator, and then applied for a similar injunction in both suits, the injunction was refused with costs (1).

7. In a bill filed under the provisions of the Merchant Shipping Act, 1854, to stay actions in other Courts for damages occasioned by a collision with the plaintiff's ship, and to have the alleged damage ascertained, the plaintiff must aver that he has incurred liability in respect of some damage (2).

8. A bill in aid of an action at Law, brought by the plaintiffs for compensation for injury sustained by them in a railway accident, which prayed for an injunction to restrain the defendants from setting up a receipt which they had pleaded in bar of the action, and which plaintiffs alleged had been obtained by fraud, is not demurrable merely because it does not go on to pray compensation or any other consequential relief in Equity, nor is it an objection that the plaintiffs might equally have availed themselves at Law of their equitable grounds of relief by a replication of fraud at Law (3). A plaintiff who seeks the interference of a Court of Equity is not bound as the price of such interference to bring the whole matter into Equity (4).

A plaintiff seeking the interference of this Court is not bound to bring the whole matter into equity.

9. In *Ware v. Regent's Canal Company* (5), Lord Chancellor Chelmsford, in speaking of the effect of delay in a suit for an injunction, said: "Upon the question whether I am to grant the injunction, I cannot avoid being influenced by the delay which has occurred in the institution of proceedings by the plaintiff, which though not amounting to absolute proof of acquiescence, yet is calculated to throw considerable doubt upon the reality of his alleged injury, and compels me to weigh the amount of inconvenience which he will sustain by my refusal of this particular

(1) *Maclaren v. Stainton, Maclaren v. Carron Company*, 26 L. J. (Ch.) 332; 21 Beav. 152; *vide* S.C. p. 1011, *ante*.

(2) *Hill v. Andus*, 1 K. & J. 263; 24 L. J. (Ch.) 229.

(3) *Stewart v. Great Western Railw.*

Co. and Saunders, 2 D. J. & S. 319; 13 W. R. 907; 2 Dr. & Sm. 438; *vide* S. C. p. 909, *ante*.

(4) *Ib.*

(5) 3 De G. & J. 212, 230; *vide* S. C. pp. 950, 951, *ante*.

remedy against the serious consequences which must result to the company from an order which will oblige them to alter the state and condition of their works."

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10. On an interlocutory application to stay an action, the plaintiff's equity must be clearly established, or he must pay the money into Court; therefore, where the equity rested on an alleged parol agreement, which was denied by the defendant, and the plaintiff declined to pay the money into Court, a motion to stay the action was refused (1).

On an interlocutory application to stay an action, plaintiff's equity must be clearly established or the money paid into Court.

11. In *McRea v. Holdsworth* (2), Vice-Chancellor Sir W. M. James said: "The cases in which the Court of Chancery had given a decree not in accordance with a verdict were either cases in which the trial had taken place before it, and it had full cognisance of the matter, or cases in which it had directed an issue to be tried, the object of which was merely to inform the conscience of the Court. When the Court withheld granting relief until a right was established at Law, it was bound by the decision at Law." But the Court is not bound by the amount of damages awarded by the jury, and the Vice-Chancellor directed an inquiry as to what damage the plaintiff had sustained by reason of the piracy of his design; the defendants to pay the costs of the suit.

12. The great purpose of a Court of Equity in assuming jurisdiction to restrain proceedings at Law is to afford a more plain, adequate, and complete remedy for the wrong complained of than the party can have at Law (3).

13. Equity will not restrain a creditor from prosecuting his legal remedy against the personal representatives of his debtor, unless there is a decree under which the creditor has a right to go in and prove his debt (4).

(1) *Greech v. Crain*, 39 L. J. (Ch.) 126. (3) *Glenn v. Fowler*, 8 Gill. & J. 340 (Amr.)

(2) 18 W. R. 489.

(4) *Ellicott v. The United States*, 7 Gill. 307 (Amr.)

PART III.

PRACTICE.

SECT. 1. *By what Means an Injunction is obtained.*

Injunctions are granted on bill or information.

1. The general rule is, that injunctions are only granted upon a bill or information praying that relief; but in some cases injunctions are granted on petition without a bill having been filed praying an injunction, and also in other cases on motion without such a bill.

In certain cases on petition or motion without a bill.

2. The cases in which injunctions are granted upon petition without a bill are where petitions are presented under the statutory jurisdiction of the Court, by which the Court has been enabled to give relief by petition in certain cases where, prior to the enabling statute, it had only power to give relief upon bill. Thus, injunctions are granted upon an order made upon an administration summons, under the 15 & 16 Vict. c. 86 (1), or on an order under the 13 & 14 Vict. c. 35, ss. 19, 24, or the 23 & 24 Vict. c. 38, s. 14, which enabled the Court to grant to the personal representatives of a deceased person an order upon motion or petition of course for an account of the debts, &c., of the deceased. In the case of *Re Creagh* (2) an injunction was granted on petition without a bill being filed, on the application of the committee of a lunatic to restrain waste by the tenants of the lunatic's estate.

On petition or motion, where a bill had been filed not praying an injunction.

3. But under the general practice, in other cases of granting injunctions upon petition and motion without a bill filed praying an injunction, a bill had already been filed, to which the relief by injunction was, in the eye of the Court, a proper and necessary adjunct; as, for instance, in *Smith v. Smith* (3) an injunction was granted on petition, in vacation, to restrain a party from marrying

(1) *Brooker v. Brooker*, 3 Sm. & Giff. 475; 2 L. J. (Ch.) 411; *vide* S. C. p. 697, *ante*.

(2) 1 Ball & B. 108; *vide* S. C. p. 690, *ante*.

(3) 3 Atk. 304.

an infant ward of the Court; in *Smith v. Clarke* (1) to restrain the sinking of a pit in a coal mine; in *London (Mayor of, &c.) v. Bolt* (2), on petition while the Court was sitting, an injunction was granted in a pressing case to restrain the putting of sugar into certain warehouses to the imminent danger of the houses; but the practice of granting injunctions upon petition in the cases last mentioned has become obsolete, as the same relief is now obtained as expeditiously by bill (3).

4. The cases in which injunctions will be granted upon motion as such adjuncts as are mentioned in the preceding placitum, are, for instance, where an administration decree in a suit has been made against an executor, in such a case an injunction will be granted on a motion in the suit on the application of the executor, the heir, or a creditor, to restrain a creditor from proceeding at Law (4). And so where the Court has full possession of the cause it will, upon motion in the suit, restrain proceeding in any other Court for the same object (5). So a purchaser under a decree, though not a party to the suit, will be restrained from acting contrary to the decree (6); and a tenant under a receiver will be so restrained (7). So the Court will restrain the attorneys, agents, servants, and workmen of the party restrained, and this although the bill and notice of motion may have merely asked for an injunction against the party himself; but the injunction will not be extended to the tenants of the party restrained (8); and a plaintiff proceeding against a defendant both at Law and in Equity at the same time and for the same matter; upon the application of the defendant calling upon the plaintiff to elect in which Court he will proceed, if he elect to proceed in Equity, will be restrained from proceeding at Law by the order directing him to elect (9).

Though bill and notice of motion merely ask injunction against the party, Court will restrain his attorneys, agents, servants, and workmen, but not his tenants. Party electing to proceed in Equity will be restrained proceeding at Law.

(1) Dick. 455.

(2) 5 Ves. 129; vide S. C. p. 1, ante.

(3) *Stead v. Glay*, 2 Coop. C. C. 173, n.

(4) *Carron Company v. Maclaren*, 5 H. L. C. 416.

(5) *Harrison v. Gurney*, 2 Jac. & W. 563; vide S. C. p. 1025, ante.

(6) *Casamajor v. Strode*, 1 S. & S.

381.

(7) *Walton v. Johnson*, 15 Sim. 352; vide S. C. p. 1037, ante.

(8) *Hodson v. Coppard*, 29 Beav. 4; vide S. C. pp. 70, 164, 510, ante.

(9) Cons. Ord. XLII. rules 5, 7; Set. Decr. 948, 950; vide *Carwick v. Young*, 2 Sw. 239. 243; *Fennings v. Humphrey*, 4 Beav. 1, 7, 8.

PART III.
SECT. 1.

The Court has in some instances where causes have been depending for other purposes, restrained proceedings in other Courts without a bill, upon undertaking to file a bill.

5. The Court has, in some instances where causes have been depending for other purposes, granted an injunction without a bill filed, to stay proceedings either at Law or in the Ecclesiastical Court, until a bill had been filed, upon the party undertaking to file a bill immediately. Thus, where there was a decree, which had been affirmed by the House of Lords, declaring that certain fee-farm rents passed by a will, and directing the trustees to convey, the defendant, in order to obtain the opinion of a Court of Law, having afterwards distrained for non-payment of these rents, upon application for an injunction Lord King observed, that though he thought himself not warranted in granting an injunction without bill, yet he would not endure to see the justice of the Court questioned, and accordingly made an order to stay the proceedings at Law till a bill was brought for an injunction (1). Upon this authority Lord Hardwicke, in the cause of *Buckingham v. Buckingham* (2), in which the duchess, after a decree directing the trusts of the will of her late husband to be carried into effect (which had been affirmed in the House of Lords), applied to the Spiritual Court, and cited the executors to prove the will *per testes*, made the same order to that in *Acherley v. Vernon*; but in *Ford v. Compton* (3) where there had been a decree for specific performance of an agreement for a lease (4), which had been accordingly executed, and the plaintiff, however, brought an action against the defendant to recover damages for the delay in performing the agreement; Lord Thurlow thought that, although the defendant would have been clearly entitled in a new suit, yet the decree having been wholly executed, the Court would not make such an order in the original cause; however, in *Macnamara v. Arthur* (5), where a bill for the specific performance of an agreement had been dismissed with costs, the plaintiff not having been able to make a good title, and he then brought an action upon the agreement; upon a motion made by the defendant to restrain him from proceeding at Law, Lord Manners granted an injunction, upon the defendant undertaking forthwith to file a bill. In *Russell v. London Chatham, and Dover Railway Company* (6) Vice-Chancellor Sir

(1) *Acherley v. Vernon*, cit. 2 Eq. C. Abr. 527.

(2) 2 Eq. C. Abr. 526.

(3) 1 Cox, 296.

(4) 2 Bro. C. C. 32.

(5) 2 Ball. & B. 349; Eden, Inj. 47, 48.

(6) 4 Giff. 403; *vide* Mitf. Plead. 5th ed. p. 55, u.

J. Stuart refused with costs a motion by a defendant, before decree, to restrain a co-defendant from prosecuting an action, or to stay all proceedings in the suit, on an affidavit that the relief sought by the bill and by the action was identical; the Vice-Chancellor said there was no authority for granting a writ of injunction on the application of one defendant against another, on an interlocutory proceeding before the cause was brought to a hearing and the decree was made.

PART III.
SECT. I.

6. Injunctions are granted *ex parte* and before the appearance of the defendant to the bill, in urgent cases of threatened mischief, and also where notice of an intention to apply for an injunction might lead to the commission of the act before the time for hearing a motion upon notice; but the bill must be filed, and a certificate thereof produced on the application, and an affidavit verifying the allegations in the bill must have been sworn and filed before the motion and after the filing of the bill, of which affidavit an office copy must be produced upon the motion. In cases of waste, and cases of injury in the nature of waste, such as working mines, piratically printing books, ploughing up ancient meadows, or negotiating a bill or promissory note fraudulently obtained, the Court will, on a sufficient case made, issue an injunction on certificate of bill filed and affidavit of merits, before appearance without notice. So as to a bill given for a gambling debt, an *ex parte* injunction has been granted to restrain its negotiation, although it was void in its very creation (1), on the ground that it would induce the necessity of making other persons parties (2).

Injunctions may be obtained in urgent cases *ex parte*, before appearance and without notice.

7. But where the danger is not imminent, so as to require the immediate assistance of the Court, leave will be given, upon filing the bill, to serve a notice of motion or a short notice with the bill (3), and in this case the notice must state that it is served by leave; if this is not done the defendant may, if he please, disregard it (4). If the plaintiff has not a case for an *ex parte* injunction, or for an application to serve a short or other notice of motion, then

Upon notice before appearance.

(1) By 9 Anne, c. 14, s. 1, such notes are now held to have been given for an illegal consideration. Eden, Inj. 320-4; Drewry, Inj. 365-8; Kerr, Inj. 610, 611.

(3) *Hill v. Rimell*, 8 Sim. 632;

(2) *Lloyd v. Gurdon*, 2 Sw. 180; *Simmons v. Heavyside*, 22 Beav. 412.

(4) *Moggridge v. Thomas*, 2 Coop. C. C. 166.

PART III.
SECT. I.

the motion for the injunction must be brought on in the same way as other ordinary motions, namely, on the day appointed by the Court for hearing motions, ordinarily once a week during the time it is sitting. In this case there must be two clear days between the service of the notice of motion and the day named in the notice for hearing the motion; and in the computation of such two clear days, Sundays and other days on which the offices are closed, except Monday and Tuesday in Easter week, must not be reckoned in the computation of such limited time (1).

Notice of motion before filing bill. Bill to be on file when notice served.

8. In *Maynard v. Fraser* (2) the Court gave leave to serve a notice of motion before the bill had been filed, upon the undertaking of the defendant that the bill should be on the file when service was effected.

After appearance—on notice, unless danger imminent, &c., then without notice.

9. After the defendant has appeared, the general rule is, that an injunction can only be moved for on notice of motion (3); but if the threatened danger is imminent, and would be irremediable, the Court will grant an injunction without a notice of motion (4); and if the motion is made after appearance the affidavit in support of it should state that fact, or the order will be irregular (5).

An injunction should be prayed for.

10. An injunction must be specifically prayed by the bill, as an injunction will not in general be granted under the prayer for general relief alone, for, as against the general words, the defendant might make a different case than he could against a prayer for an injunction (6).

But in some cases granted where no prayer.

11. But after a decree for an account under a bill of foreclosure, the Court will restrain the mortgagor from cutting timber, without a prayer for an injunction (7). So after an administration decree it

(1) Ord. XXXVII., r. 11; *et vide* r. 12.

(2) 26 L. T. 88.

(3) *Marasco v. Boiton*, 2 Ves. Sen. 112; *Langham v. Great Northern Railw. Co.*, 1 De G. & Sm. 486; Eden, Inj. 322; *Drewry*, Inj. 367; Dan. Ch. Pr. 3rd ed. 1508.

(4) *Aller v. Jones*, 15 Ves. 605; *Acraman v. Bristol Dock Company*, 1 Russ. & My. 321; *Petley v. Eastern Counties Railw. Co.*, 8 Sim. 483; *Bell v. Hull and Selby Railw. Co.*, 1 Railw.

Cas. 623; *Harrison v. Cockerell*, 3 Mer. 1; *Collard v. Cooper*, 6 Madd. 190; *Lewis v. Langham*, 2 Coop. C. C. 170, n.; *Randall v. Commercial Railw. Co.*, *ibid.* 169, n.

(5) *Harrison v. Cockerell*, 3 Mer. 1; *Randall v. Commercial Railw. Co.*, 8 L. J. (N. S.) Ch. 252; *Sutton v. Mumford*, 2 Coop. C. C. 171, n; see *Betts v. Barlow*, 3 Jur. (N. S.) 154.

(6) *Savoy v. Dyer*, Amb. 70; *Wright v. Atkyns*, 1 V. & B. 314; Eden, Inj. 48.

(7) *Id.*

will restrain a creditor from suing at Law (1); but leave will be given to amend the bill by adding a prayer for an injunction (2).

PART III.
SECT. I.

12. But an injunction may be granted at the hearing of the cause, although not prayed by the bill (3). So, after decree, parties to the suit, or persons who have or may come in under the decree, will be restrained from taking proceedings contrary to the decree or violating its spirit, without any prayer for an injunction (4). And under similar circumstances the Court will also, without a prayer, restrain the parties to the suit and others from injuring the property (5).

Injunctions may be granted at the hearing without a prayer. So, after decree.

13. Upon an application for an *ex parte* injunction the material facts of the case must be fully and fairly stated in the bill, and not misrepresented or concealed (6); but if upon the application for an *ex parte* injunction the facts are stated as they were shortly before filing the bill, and it should turn out that the defendants had commenced abating the injury the day before the application, the injunction is not irregularly obtained, provided the plaintiff was not aware of that fact at the time of the application, and such ignorance does not amount to such a misrepresentation as to lead the Court to hold that the injunction was improperly obtained (7). In *Attorney-General v. Liverpool (Mayor of)* (8) the Master of the Rolls said that he had never heard the rule carried to the extent

On *ex parte* application for an injunction the material facts must be fully and fairly stated in bill.

(1) *Paxton v. Douglas*, 8 Ves. 520; *Jackson v. Leaf*, 1 J. & W. 232, and cases in the note there; *Clarke v. Earl of Ormonde*, 1 Jac. 122.

(2) *Jacob v. Hall*, 12 Ves. 458; *Wood v. Beadell*, 3 Sim. 273.

(3) *Reynell v. Sprye*, 1 De G. M. & G. 660; *Blomfield v. Eyre*, 8 Beav. 250.

(4) *Cusamajor v. Strode*, 1 S. & S. 381; *Cholmondeley v. Clinton*, 19 Ves. 261; *Doolittle v. Walton*, Dick. 442; *Hammond v. Maundrell*, 6 Ves. 673, *notis*; *Paxton v. Douglas*, 8 Ves. 520; *Wright v. Atkyns*, 1 V. & B. 314; *Wedderburn v. Wedderburn*, 2 Beav. 209; *Goodman v. Kine*, 8 Beav. 379; *Flight v. Chambré*, 14 Jur. 123; *Grand Junction Canal Company, v. Dimes*,

17 Sim. 38; *Turner v. Turner*, 19 L. J. (Ch.) 352; *Att.-Gen. v. Ancaster (Duke of)*, Dick. 68; and a case cited in *Mogg v. Mogg*, Dick. 670.

(5) *Wright v. Atkyns*, 1 V. & B. 313.

(6) *Att.-Gen. v. Mayor of Liverpool*, 1 My. & Cr. 210, 211; *Stedman v. Webb*, 4 My. & Cr. 346; *Goodman v. De Beauvoir*, 4 Railw. Cas. 381, 384; *Barker v. North Staffordshire Railw. Co.*, 5 Railw. Cas. 401; *Hemphill v. McKenna*, 3 D. & War. 183; *Castelli v. Cook*, 7 Hare, 89; *Dalglish v. Jarvie*, 2 Mac. & G. 231; *Maclaren v. Stainton*, 16 Beav. 290.

(7) *Semple v. London and Birmingham Railw. Co.*, 1 Railw. Cas. 480.

(8) 1 My. & Cr. 211.

PART III.
SECT. 1.

that a party applying for an *ex parte* injunction was bound to lay the whole law before the Court.

Delay in applying for an injunction, and allowing material expenses and engagements to be incurred and entered into, is a bar, unless delay is satisfactorily explained.

14. If a party is cognisant of his right, and does not take those steps to assert it which are open to him before he has, by his silence and conduct, allowed the adversary to incur material expenses, or to enter into engagements difficult to be discharged, he will lose his right to the interposition of Equity (1); but if the delay is satisfactorily explained, as that it was in fact in the nature of a negotiation under protest, with a view to an amicable arrangement (2); or if the delay is while acts done are only preliminary to the acts against which the plaintiff claims relief, and not such acts themselves (3), the plaintiff will not by such delay lose the benefit of his equity. And it seems doubtful, where both parties are ignorant of the equity or right which the one party might have asserted, if he was aware of it, how far he ought or ought not to be prejudiced in the assertion of that right which belonged to him, by the situation in which the other party may have been placed owing to the non-assertion of it (4).

Delay in appealing from the refusal of a motion for an injunction may be a bar.

15. Delay in appealing from the refusal of a motion for an injunction may be a bar to the application. In *Williams v. St. George's Harbour Company* (5) an appeal motion was, on the ground of delay, ordered to stand over till the hearing, there having been a lapse of a calendar month from the refusal of the motion for the injunction.

SECT. 2. *By what Means an Injunction is dissolved.*

By the general rule, interlocutory injunctions can only be dissolved on motion in open Court; but, except as

1. The general rule is, that interlocutory injunctions of whatever kind can only be dissolved upon motion in open Court (6). And since the abolition of common injunctions (with the exception noticed in pl. 6, *infra*), not as of course, but upon the merits only, in pl. 6, *infra*, not as of course, but upon the merits only.

(1) *Greenhalgh v. Manchester and Birmingham Railw. Co.*, 1 Railw. Cas. 680; *vide* S. C. p. 828, *ante*.

(2) *Innocent v. North Mid. Railw. Co.*, 1 Railw. Cas. 242, 256.

(3) *Northam Bridge and Road Company v. London and Southampton Rail. Co.*, 1 Railw. Cas. 658.

(4) 1 Railw. Cas. 110; *Drewry, Inj.* 294.

(5) 2 De G. & J. 547; *South Staffordshire Railw. Co. v. Hall*, 16 Jur. 93.

(6) *Eden, Inj.* 326; *Drewry, Inj.* 409; *Kerr, Inj.* 627.

all injunctions being now special, and obtained and dissolved on the merits only (1). An interlocutory injunction may be dissolved at any time before the hearing of the cause (2); and it is said in *Eden, Inj.* p. 326, that in extremely pressing cases, the Lord Chancellor has, in the vacation, appointed a special hearing at his house for this purpose. In *De Beaufort v. Archdeacon* (3) an injunction to stay the transfer of stock by the bank, was, upon the special circumstances of the case, dissolved on petition by parties to the suit. In this case the sum was very small, and the petition was presented by the parties solely interested in the stock, and was consented to by the representative of the testator. Where the application to dissolve is by a stranger to the suit, it may be either by motion or petition, according to the less or greater complication of the case (4).

2. In *Grant v. Priddell* (5) it was held that a conditional consent to proceed at Law waived an injunction.

3. In an early case it was held that a defendant by answering the bill waived the irregularity of obtaining an injunction where it had not been prayed by the bill (6).

4. If on obtaining an *ex parte* injunction there were misstatement, misrepresentation, or suppression of material facts, the injunction will be dissolved (7). It is not sufficient that the plaintiff was not aware of the importance of the facts misstated or concealed (8), or that he had forgotten them (9). Nor will the plaintiff be allowed to maintain the injunction, on the merits disclosed maintain the injunction, on the merits disclosed on the motion to dissolve.

PART III.
SECT. 2.

An interlocutory injunction can be dissolved at any time before the hearing of the cause.

Injunction (here) dissolved on a petition.

Application to dissolve by a stranger to the suit may be by motion or petition, according to the less or greater complication of the case.

Answer is waiver of the irregularity of obtaining injunction not prayed for.

Ex parte injunctions obtained on misstatement, &c., will be dissolved;

and the plaintiff will not be allowed to

(1) *Vide* p. 1, *ante*.

(2) *Dan. Ch. Pr.* 4th Ed. 1514; *Kerr, Inj.* 626.

(3) 1 Y. & C. 549; *vide* S. C. p. 960.

(4) *Bourbaud v. Bourbaud*, 12 W. R. 1024; *Jones v. Roberts*, 12 Sim. 189; *vide post*, p. 1273.

(5) 1 Anst. 62.

(6) *Davill v. Peacock*, Bar. 25.

(7) *Hilton v. Lord Granville*, 4 Beav. 130; *Brown v. Newall*, 2 My. & Cr. 558, 570; *Semple v. London and Birmingham Railw. Co.*, 1 Railw. Cas. 493; *Bell v. Hull and Selby Railw. Co.*,

Ibid. 616; *Greenhalgh v. Manchester and Birmingham Railw. Co.*, 3 My. & Cr. 799; *Stedman v. Webb*, 4 My. & Cr. 346; *Custelli v. Cook*, 7 Hare, 89, 94; *Dalglisk v. Jarvie*, 2 Mac. & G. 238; *Phillipps v. Prichard*, 1 Jur. (N. S.) 750; *Fitch v. Rochfort*, 18 L. J. (Ch.) 458.

(8) *Att.-Gen. v. Corporation of Liverpool*, 1 My. & Cr. 210, 211; *Dalglisk v. Jarvie*, 2 Mac. & G. 241.

(9) *Clifton v. Robinson*, 16 Beav. 355; *Sheard v. Webb*, 2 W. R. 343.

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The Court will not, upon dissolving an *ex parte* injunction to restrain proceedings at Law, go further than dissolving it with costs, unless there has been such a misstatement as would operate on the mind of the Court to induce it to make the order.

If the case has been properly brought forward, and no concealment, if considerations affecting the question have been overlooked, the Court will deal with the motion according to the merits.

An injunction will not be dissolved for misstatement of legal consequences.

Nor for not stating the whole law.

on the motion to dissolve (1). But if an *ex parte* injunction to stay proceedings at Law has been improperly obtained, the Court will not go beyond dissolving it with costs, unless there has been not merely a misstatement of circumstances in the application for it, but that species and extent of misstatement which would operate on the mind of the Court to induce it to make the order. Thus in *Brown v. Newall* (2), where it appeared that there had been misrepresentations in the affidavits on which the plaintiff had obtained an injunction to stay an ejectment, but they were misrepresentations as to facts, either not within the jurisdiction of the Court, or such as would not affect its decision; Lord Cottenham held, that though it was proper to dissolve the injunction, a further order by which the plaintiffs in Equity were directed to give judgment in the ejectment was irregular. And if the case has been properly brought forward, and there has been no concealment, the Court, if any considerations affecting the question have been overlooked, will say it has itself to blame for not having looked more carefully into the case; and the Court then hears the motion and deals with it according to the merits (3). And the obtaining an injunction *ex parte* upon misrepresentation or suppression of facts is not a contempt of Court which will be punished by attachment (4). The plaintiff is only bound by the facts which he states, and not by his statements of the legal consequences arising from the facts stated (5).

5. In *Attorney-General v. Liverpool (Mayor of)* (6) the Master of the Rolls said that the objection there taken was, not that the facts were not stated, but that the whole law was not stated; that is to say, that the attention of the Court could not have been called to certain provisions of the Act, which would have presented a different view of the case to the mind of the judge, and that if fault was to be found with any one, it was, he was afraid,

(1) *Att.-Gen. v. Corporation of Liverpool*, 1 My. & Cr. 211; *Hilton v. Lord Granville*, 4 Beav. 131; *Castelli v. Cook*, 7 Hare, 89-94; *Dalglisch v. Jarvie*, 2 Mac. & G. 238.

(2) 2 My. & Cr. 558.

(3) *Castelli v. Cook*, 7 Hare, 94.

(4) *McCarthy v. Maguire*, 1 Moll. 47; *Brown v. Newall*, 2 My. & Cr. 558, 574.

(5) *Brown v. Newall*, 2 My. & Cr. 558.

(6) 1 My. & Cr. 211.

with the Court, which was bound to know every clause in every Act that ever passed—a degree of knowledge hardly to be hoped for; and that he never heard the rule carried to this extent, that the party applying was bound to lay the whole law before the Court. A party who has obtained an *ex parte* injunction afterwards dissolved on the ground of concealment of material facts, may make an application for another injunction on the merits (1).

6. Prior to the abolition of common injunctions (2) where the plaintiff had obtained an injunction (that is to say, the common injunction) to restrain proceedings at Law until answer, the defendant could by a motion of course, after he had put in his answer, move at once to dissolve the injunction, unless the plaintiff undertook to except to the answer, or to shew cause on the merits confessed by the answer, that there was no equity to dissolve the injunction (3). The present practice on injunctions to stay proceedings at Law having been assimilated to the practice on special injunctions only “so far as the nature of the case will admit,” the former practice on injunctions to stay proceedings at Law, is, to some extent, still in force (4). And if an injunction has been granted to restrain proceedings at Law “until answer,” or “further order,” or “until answer with liberty to apply,” or in any similar terms (and this can only be granted upon a special application, supported by affidavits shewing that the allegations in the bill are well founded (5)), the defendant is still, as under the old practice, not entitled to move to dissolve until he has put in a sufficient answer (6). The Master of the Rolls, Sir J. Romilly, said in *Mollett v. Enequist* (7) that it was not intended by the statute (15 & 16 Vict. c. 86) to take away from the plaintiff the right and advantage of having a full discovery from the defendant. But as soon as the defendant has put in, within the prescribed time, an answer not excepted to for insufficiency (8), or as soon as the

Dissolving
injunctions to
stay proceed-
ings until dis-
covery.

(1) *Fitch v. Rochfort*, 18 L. J. (Ch.) 458; see *Phillipps v. Prichard*, 1 Jur. (N. S.) 750.

(2) *Vide* p. 1, *ante*.

(3) *Magnay v. Mines Royal Company*, 3 Drew. 133.

(4) 15 & 16 Vict. c. 86, s. 58; *Lovell v. Galloway*, 17 Beav. 1.

(5) *Magnay v. Mines Royal Company*, 3 Drew. 133.

(6) *Mollett v. Enequist* (No. 2), 26 Beav. 467; *Ooddeen v. Oakley*, 2 De G. F. & J. 161.

(7) *Supra*.

(8) See *Fox v. Hill*, 2 De G. & J. 353; *Ooddeen v. Oakley*, 2 De G. F. & J. 158.

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But dissolved
only upon
motion with
notice.

plaintiff has allowed the time for excepting to the sufficiency of the answer to expire, the defendant is entitled, as of course, to have the injunction granted for the purpose of discovery, dissolved (1); but the injunction will remain in force until discharged by the Court (2). And the injunction can only be dissolved upon a special motion upon notice in the usual manner (3). And the plaintiff cannot have the injunction continued upon a case made by amendment; he must file a fresh bill if he wishes further discovery (4); nor will the filing of a plea, entitle a defendant to have an injunction until answer, dissolved (5); and in whatever terms an injunction may be conveyed, it is never dissolved, except upon motion in open Court. But occasionally, in extremely pressing cases, the Lord Chancellor has, in the vacation, appointed a special hearing at his house for this purpose (6). The notice of motion should be given in the usual manner (7) for one of the days appointed for the hearing of motions; but if the case is urgent, and it is important the motion should be made before such day, application may be made to the Court, before the notice of motion is served, for permission to give the notice of motion for a particular day not appointed for the hearing of motions. The fact that such permission has been given must be stated in the notice of motion (8). The plaintiff is sometimes, on obtaining an *ex parte* order, or an *interim* order, required to enter into an undertaking to accept short notice of motion to discharge the order (9). The plaintiff cannot have the injunction continued upon a case made by amendment (10).

The Court
would not,
pending appli-
cation for pro-
duction of
documents in
schedule to

7. In *Storer v. Jackson* (11) Vice-Chancellor Sir Lancelot Shadwell refused to hear a motion to dissolve an *ex parte* injunction on the coming in of the answer, pending a motion, of which the

(1) *Mollett v. Enequist* (No. 2), 26 Beav. 467.

(2) *Ooddeen v. Oakley*, 2 De G. F. & J. 158.

(3) *Ooddeen v. Oakley*, 2 De G. F. & J. 158, 160, 161; Dan. Ch. Pr. 4th Ed. 1440; *vide* p. 1301, post.

(4) *Mollett v. Enequist*, 25 Beav. 609; 26 Beav. 466.

(5) *Wroe v. Clayton*, 10 Sim. 185.

(6) *Eden*, Inj. 326; *Kerr*, Inj. 627; Dan. Ch. Pr. 4th Ed. 1515.

(7) Cons. Ord. xxxiii. r. 2.

(8) *Hill v. Rimmell*, 2 My. & Cr. 641; 2 Jur. 45; Dan. Ch. Pr. 4th Ed. 1443, 1515.

(9) *Seton*, 3rd Ed. 867, 870.

(10) *Mollett v. Enequist*, 26 Beav. 466; *et vide Harris v. Collett*, 26 Beav. 222; *Senior v. Pritchard*, 16 Beav. 473; *Chilton v. Campbell*, 20 Beav. 531; *Lloyd v. Adams*, 4 K. & J. 467.

(11) 12 Sim. 503.

plaintiff had given notice, for the production of documents mentioned in the schedule to the answer, until the motion for production had been disposed of; because the contents of the documents were part of the discovery which the plaintiff was entitled to extract from the defendant, and the plaintiff had not been guilty of any unnecessary delay in giving notice of his motion.

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answer, hear a motion to dissolve an injunction on coming in of answer.

8. Where an injunction has issued irregularly, the defendant is entitled to have the order discharged, but any act of his founded upon it, is a waiver of the irregularity, and an affirmation of the subsistence of a regular injunction (1). And it was, under the old practice, accordingly determined that a defect in the injunction would be cured by the defendant putting in his answer, and moving to dissolve (2); but irregularity is not waived by merely moving for time to answer the bill (3).

No dissolution if the irregularity is waived by any act of defendant.

9. An injunction irregularly obtained must be discharged by a motion to discharge the order for the injunction, and not by a motion to dissolve the injunction, such a motion would be a waiver of the injunction (4).

An injunction irregularly obtained must be discharged by a motion to discharge the order for the injunction.

10. The Court will not, upon a motion to discharge an *ex parte* order of course for irregularity, support or sustain it on the merits, but will discharge the order, giving the party the opportunity of regularly obtaining the order, upon a proper application (5).

11. On an appeal from an order made by the Court, in which an *ex parte* injunction has been granted, or by which it has been continued, the question, whether there was, upon the application for the injunction, a misrepresentation or concealment of material facts, cannot be taken into consideration (6).

12. Delay in applying to the Court to dissolve an injunction, and long acquiescence in an order for an injunction, are grounds for refusing to dissolve, and may deprive a defendant of his right

Acquiescence in an order for an injunction, and delay, disentitle to a right to dissolve.

(1) *Travers v. Stafford* (Lord), 2 Ves. Sen. 19, 22; *Vipan v. Mortlock*, 2 Mer. 476; *Eden*, Inj. 88.

(2) *Daville v. Peacock*, Barnard. Ch. Rep. 27.

(3) *Travers v. Stafford* (Lord), 2 Ves. Sen. 20; *Amb*. 105.

(4) *Vipan v. Mortlock*, 2 Mer. 476;

Angier v. May, 3 W. R. 330.

(5) *Brooks v. Purton*, 4 Beav. 494; *St. Victor v. Devereux*, 6 Beav. 584; *Harris v. Start*, 4 My. & Cr. 261; *Grove v. Sansom*, 1 Beav. 297.

(6) *Bell v. Hull and Selby Railw. Co.*, 1 Railw. Cas. 616.

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to have an injunction dissolved (1). In *Bell v. Hull and Selby Railway Company* (2) it was held that although the circumstance of the plaintiff having concealed material facts on an application for an *ex parte* injunction, would be good ground for dissolving it, yet if the defendants let several months elapse before coming to dissolve, they will not, after such delay, be heard to dissolve on that ground. In *Cardinall v. Molyneux* (3) Lord Chancellor Westbury would not disturb an order for an injunction which had been made in a case where the Court had no jurisdiction, but allowed the order to stand over on an undertaking of the plaintiff.

13. On a motion to dissolve an injunction, a defendant may rely on the same objections to the bill, as would have formed ground for demurring to it (4).

On a motion to dissolve an injunction granted in terms of prayer of bill, the Court cannot grant a new injunction in terms not prayed by bill.

14. On a motion to dissolve an *ex parte* injunction, granted in the terms of the prayer of the bill, it is not competent to the Court to grant a new injunction, in terms not prayed by the bill (5). Nor is it competent for the plaintiff, on the motion to dissolve, to make a new case (6).

SECT. 3. *What is done on the Motion to dissolve.*

On motion to dissolve, the Court dissolves, or continues the injunction, or in certain cases directs an issue.

1. Upon a motion being made to dissolve an injunction, the Court will either absolutely dissolve the injunction, or continue it to the hearing, or may, under sect. 2 of the 25 & 26 Vict. c. 42, direct an issue to a Court of Law where it is of opinion the question of fact can be more conveniently tried there than by itself (7). But the Court will avail itself of the option it now has under the

(1) *Bell v. Hull and Selby Railw. Co.*, 1 Railw. Cas. 616; *Glascott v. Lang*, 3 My. & Cr. 451; *Bickford v. Skewes*, 4 My. & Cr. 498; *Feistel v. King's College, Cambridge*, 10 Beav. 491; *Great Western Railw. Co. v. Oxford, Worcester, &c., Railw. Co.*, 3 De G. M. & G. 341.

(2) *Supra*.

(3) 7 Jur. (N. S.) 854; 4 L. T. (N. S.) 605.

(4) *Hudson v. Maddison*, 12 Sim.

416; 5 Jur. 1194; *Barnsley Canal Company v. Turbell*, 7 Beav. 19, 31; *Jones v. Garcia Del Rio*, T. & R. 297.

(5) *Burdett v. Hay*, 33 L. J. (Ch.) 41; *Cresy v. Beavan*, 13 Sim. 99.

(6) *Barber v. North Staffordshire Railw. Co.*, 5 Railw. Cas. 401.

(7) *Eaden v. Firth*, 1 H. & M. 573; *Bovill v. Goodier*, L. R. 2 Eq. 195;

Freeman v. Tottenham and Hampstead Railw. Co., 11 Jur. (N. S.) 254; *Eden*, Inj. 329; *Kerr*, Inj. 220.

2nd section of the last-mentioned Act, only in exceptional cases and under special circumstances; it must be satisfied that the administration of justice in the particular case, may be more conveniently exercised and promoted by directing such issue at Law, than by completing the hearing and inquiry, both as to the law and facts, as it can, under the 25 & 26 Vict. c. 42, now do before itself (1). And the Court cannot now, except under exceptional circumstances, require the plaintiff in an injunction suit to establish his right at Law, but must try the whole question before itself (2). And by the 4th section of the Act it is provided that nothing in the Act shall make it necessary to grant relief in any suit concerning any matter as to which a Court of Common Law has concurrent jurisdiction, if it shall appear to the Court that such matter has been improperly brought into Equity, and that the same ought to have been left to the sole determination of a Court of Common Law. And where an action at Law has been commenced before the filing of the bill, the Court will not, upon a bill filed after the commencement of such action seeking relief, the title to which is dependent upon the legal right, assume, as of course, exclusive jurisdiction under the above-mentioned Act, and restrain the proceedings in the action (3). But by sect. 4 of the same Act, in all cases where the object of the suit is to recover or defend the possession of land under a legal title, or under a title which would have been legal but for the existence of some outstanding term, lease, or mortgage, such relief only shall be given in Equity as would have been proper according to the rules and practice of the Court had the Act not passed; and although an heir is still entitled to have the validity of a contested will tried upon an issue, or possibly, under the 25 & 26 Vict. c. 42, by a jury before the Court of Chancery, he is not entitled, as of course, to an issue *devisavit vel non* (4). If the determination of the legal right is in the plaintiff's favour, he has a strict right to an injunc-

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The Court cannot now, except under exceptional circumstances, require plaintiff in an injunction suit to establish his right at Law.

(1) *Young v. Fernie*, 1 De G. J. & S. 353; *Re Hooper*, 32 L. J. (Ch.) 55; *Baylis v. Watkins*, 8 Jur. (N.S.) 1165; *Egmont v. Darrell*, 1 H. & M. 563; *Copeland v. Webb*, 1 N. R. 119; *Fernie v. Young*, L. R. 1 H. L. 63.

(2) *Re Hooper*, 32 L. J. (Ch.) 55;

Baylis v. Watkins, 8 Jur. (N. S.) 1165; *Davenport v. Jepson*, 1 N. R. 173; *Fernie v. Young*, L. R. 1 H. L. 63.

(3) *Curler v. Carter*, 33 L. J. (Ch.) 370.

(4) *Williams v. Williams*, 33 Beav. 306; *Cowgill v. Rhodes*, 1b. 310.

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tion until the hearing (1); and it is no answer to the application that the defendant volunteers to keep an account (2). Though the Court of Law should certify against the plaintiff's title, still the cause must proceed to a hearing. In *Brooke v. Clarke* (3) a motion was made to dismiss the bill with costs, by analogy to the practice on bills for specific performance, where the Master's report was adverse to the plaintiff, but the application was refused; Lord Chancellor Eldon said that on the application for an injunction he doubted the plaintiff's title, but that being a question of Law he directed a case for the opinion of the Court of King's Bench, that the judges had certified that the plaintiff had no title, that they had therefore advanced thus far, that the plaintiff could not succeed in the motion for an injunction, and that the case stood as if he had declared his own opinion to that effect; and he said that the cause might still be brought to a hearing, and that the person who then presided in the Court might entertain a different opinion on the question of title.

It is no objection to the granting or continuing an injunction, that the case is of such a nature, that an account cannot be decreed upon it.

2. It is no objection to the granting or continuing an injunction, that the case is of such a nature, that an account cannot be decreed upon it. Lord Eldon, in *Universities of Oxford and Cambridge v. Richardson* (4), suggested several cases clearly illustrative of this doctrine; where, either from difficulties arising from the complex nature of the title of several plaintiffs interested in the same account, or from the trifling value of the injury actually committed, or from the circumstance that the evil sought to be restrained had then, as yet, only been threatened by the defendant and not commenced, an account could not be taken, but yet the plaintiff would clearly be entitled to an injunction.

SECT. 4. *Who may apply to dissolve, and before whom the Application should be made.*

A stranger to the suit may, in exceptional cases,

1. In exceptional cases a stranger to the suit may proceed to dissolve an injunction; thus, in *Delvin (Lord) v. Smyth* (5), Sir

(1) *Renard v. Levinstein*, 2 H. & M. 628.

(2) *Ib.*

(3) 1 Sw. 550.

(4) 6 Ves. 701, 705, 706; Eden, Inj. 329.

(5) *Mosc.* 354.

J. Jekyll, upon a motion by a *cestui que trust*, who was no party to the cause, dissolved an injunction against his trustee, who was defendant in the suit, on the ground of collusion between the trustee and the plaintiff in Equity, upon the terms of the *cestui que trust* giving security to appear to the original bill, if Lord Delvin would make him a party, and abide the order of the Court at the hearing. And in *Bourbaud v. Bourbaud* (1), where a foreigner, who was the sole plaintiff in a suit, obtained an interlocutory injunction, but did not take any steps to prosecute the suit for a year and a half, during which time, as was alleged, he became bankrupt in France, according to French law; upon a petition being presented to dissolve the injunction by a stranger to the suit (the counsel for the petitioner alleging that the complicated state of the facts, coupled with the circumstance that a stranger to the suit was seeking to dissolve, caused a petition, and not a motion, to be the proper form of proceeding, on the authority of *Jones v. Roberts* (2)), Vice-Chancellor Sir W. P. Wood ordered, that a special notice should be served on the solicitor to the plaintiff, to the effect that the Court had been informed that the plaintiff was a bankrupt according to French law, and that, unless on or before the last petition day of the sittings (distant about a fortnight), the plaintiff continued the suit, or caused his bankruptcy to appear to the Court, the petition should be brought on. In *Jones v. Roberts* (3) it was held that a person, though not a party to a suit, may apply in it by motion (stating his title in the notice of motion), unless a long statement of facts is required to shew his title, and then he must apply by petition.

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apply to dissolve, and by motion or petition, according to the circumstances of the case.

2. In *Thompson v. Geary* (4) it was doubted whether, where a special injunction had been granted against several defendants, one of them could move to dissolve without bringing the others before the Court. The Master of the Rolls, Lord Langdale, said, that if the defendant moving should succeed, the situation of the other defendants would be materially altered in their absence; and the Court also doubted at the same time whether, if present, the defendants, not moving to dissolve, could oppose the motion, and

One defendant may, under exceptional circumstances, and except in interpleader suits, move to dissolve an injunction in the absence of the others, unless they are interested with the party moving.

(1) 12 W. R. 1024.

(3) 12 Sim. 189.

(2) *Infra*.

(4) 5 Beav. 131.

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the point was not decided. But although in an interpleader suit the notice to dissolve the injunction given by a co-defendant must be served on all the defendants, as well as upon the plaintiff (1), yet it has been held, in other cases, that one defendant may, under exceptional circumstances, move to dissolve in the absence of the other defendants (2). But if other parties are interested with the party moving, it is necessary to serve them also with the notice of motion to dissolve (3).

Each of the parties restrained must move to dissolve, and the injunction will not be dissolved as to those not moving.

3. If an injunction has been granted against two or more defendants, each of them must move to dissolve; and as to the party who applies, the injunction will be dissolved, but as to the others who have not applied, it will not be dissolved (4).

4. If there are several defendants, although each defendant is at liberty to apply to dissolve an injunction as to himself (5), without regard to the state of the proceedings as to the other defendants, yet, if an action at Law has been commenced by the defendants jointly, the Court will not in general dissolve the injunction if it has been extended to stay trial, until all the defendants have answered (6). But there are exceptions to this rule—thus, in a case where an injunction had been granted against solvent partners and the assignees of insolvent partners, restraining proceedings at Law, the defendants, the solvent partners, on putting in a sufficient answer, although the answer of the assignees of the insolvent partners had been excepted to, moved to dissolve the injunction against all; and the Court declared that it was competent for the defendants, the solvent partners, to make this motion, but that the injunction could not be dissolved pending the exceptions to the answer of the assignees. It appeared that the solvent defendants had no power of compelling the assignees to answer; but the Court said, that the plaintiff having sworn that

(1) *Masterman v. Lewin*, 2 Ph. 182, 186; *Hyde v. Warren*, 19 Ves. 322; *Stevenson v. Anderson*, 2 V. & B. 407; *Townley v. Deare*, 3 Beav. 216; *East and West India Dock Company v. Littledale*, 7 Hare, 57.

(2) *Joseph v. Doubleday*, 1 V. & B. 497; *Money v. Jordan*, 13 Beav. 229.

(3) *Service v. Castaneda*, 9 Jur. 367; *et vide Moseley v. Moseley*, 9 W. R. 581.

(4) *Bramwell v. Halcomb*, 3 M. & C. 737, 741.

(5) *Lewis v. Smith*, 7 Beav. 470.

(6) *White v. Steinwacks*, 19 Ves. 83; and see *Lewis v. Smith*, 7 Beav. 470.

he expected a discovery, &c. (being the usual affidavit to extend an injunction to stay trial), it would not dissolve the injunction until such answer had been filed (1).

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5. If officers of a corporation are made co-defendants to a bill for a discovery, and an injunction to stay an action brought by the corporation, the injunction will be dissolved on the coming in of the answer of the corporation, although the officers have not answered (2).

6. In *Macgregor v. Cunningham* (3) where a bill was filed for a discovery in aid of the plaintiff's defence to an action which the defendants, who were eight in number, had brought against him, and the plaintiff had obtained the injunction for want of answer (that is to say, under the old practice the common injunction), and six of the defendants had then put in their answer, and had obtained an order to dissolve the injunction as against themselves; and afterwards the other two defendants had put in their answer, but would not move to dissolve the injunction as against themselves, although it was competent to them to do so; and the other six then moved, without notice to their co-defendants, that the injunction might be dissolved as against the latter; the Court granted the motion.

7. The bankruptcy of a sole plaintiff who has obtained an injunction does not dissolve the injunction, though it renders the suit defective; but the defendant may serve a notice of motion on the assignees to revive the suit within a given time, or that the bill may be dismissed; and if the suit is not revived, the injunction will be dissolved (4). And so, where the plaintiff became insol-

The bankruptcy of sole plaintiff does not dissolve an injunction, but if the suit is not revived, the injunction will be dissolved.

(1) *Joseph v. Doubleday*, 1 V. & B. 497; *Caird v. Campbell*, 2 Moll. 399; *Kilby v. Stanton*, 2 Y. & J. 75; *Imperial Gas Light Company v. Clarke*, You. 580; *Glascott v. Copper Miners Company*, 11 Sim. 314; *Lewis v. Smith*, 7 Beav. 470; *Money v. Jordan*, 13 Beav. 229; *Prince v. Haydin*, 3 Y. & J. 190.

(2) *Glascott v. Copper Miners Company*, 11 Sim. 305, 314.

(3) 16 Sim. 365; *Joseph v. Doubleday*, 1 V. & P. 497; *Lewis v. Smith*,

7 Beav. 470.

(4) *Randall v. Mumford*, 18 Ves. 424, 427; *Caird v. Campbell*, 1 Moll. 484; *Wheeler v. Malins*, 4 Madd. 171; *Huntingtower (Lord) v. Sherborne*, 5 Beav. 380; *Lee v. Lee*, 1 Hare, 621; *Fisher v. Fisher*, 4 Hare, 196; *M'Beath v. Ravenscroft*, 18 L. J. (N. S.) Ch. 208; *Meiklam v. Elmore*, 4 De G. & J. 208; *Jackson v. Riga Railw. Co.*, 28 Beav. 75; *Bourbaud v. Bourbaud*, 12 W. R. 1024; *et vide* Eden, Inj. 130.

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vent, an order would be made that the injunction be dissolved, unless assignees were appointed and filed a supplemental bill within a limited time (1).

The Court will, in a proper case, give leave to move to discharge an order for an injunction made on affidavit of service of notice of motion.

8. Where an order for an injunction has been made on motion, and affidavit of service in the absence of parties, the Court will, on a proper application, give the absent party leave to move to discharge the order (2).

The abatement of a suit by death of sole plaintiff does not dissolve an injunction, if before decree the suit must be revived, or the injunction may be dissolved.

9. The abatement of a suit by the death of a sole plaintiff, does not of itself, dissolve an injunction, as (except upon a dismissal of the bill (3)), the general rule is, that an injunction once issued cannot be discharged without an order for that purpose (4). If a sole plaintiff dies, the defendant may, before decree, serve a notice of motion on his representatives, that they do revive the suit within a given time, or, in default, that the injunction may be dissolved (5). But after a decree continuing an injunction, the general rule is, that such an application is irregular (6), for the injunction is untouched and remains in force (7). Lord Chancellor Bathurst said, in *Askew v. Townsend* (8), that the decreeing a perpetual injunction, were it necessary to revive upon every abatement, would be, in effect, decreeing a perpetual suit. But in *Price v. Berrington* (9), which was a suit by a lunatic and his committee, where an injunction had been granted, and a decree made directing an issue, and the lunatic died, and no further proceedings had been taken by the committee, upon a motion by the defendant that the suit might either be revived within a limited time or dismissed, the Court ordered that the injunction should be dissolved and all proceedings stayed, unless the suit should be revived within a

(1) *Caird v. Campbell*, 1 Moll. 484.

(2) *Mapp v. Elcock*, 22 L.J. (N. S.) Ch. 707; 17 Jur. 370.

(3) *Green v. Pulsford*, 2 Beav. 70.

(4) *Askew v. Townsend*, 2 Dick. 472; *Ferrand v. Hamer*, 4 M. & C. 143, 147.

(5) *Chandos (Duke of) v. Talbot*, Sel. Ch. Ca. 24; *Wheeler v. Mulins*, 4 Madd. 171; *Randall v. Mumford*,

18 Ves. 427; *Stuart v. Ancell*, 1 Cox, 411; *Hill v. Hoare*, 2 Cox, 50; *Adamson v. Hall*, 1 T. & R. 258; *vide* Eden, Inj. 130-133; *et vide* Cons. Ord. xxxii. r. 4.

(6) *Oldfield v. Cobbett*, 20 Beav. 563; *Askew v. Townsend*, 2 Dick. 471; *Yeomans v. Kilvington*, 1 Dick. 351; 2 Dan. Ch. Pr. 4th Ed. 1521.

(7) *Ib.*

(8) *Supra.*

(9) 11 Beav. 90.

limited time. But if one of several plaintiffs dies, the suit is not, under the modern practice, abated, where the remaining plaintiffs can obtain a decree, and an order of revivor is not necessary; and the proper order is not that the plaintiffs should revive or the bill be dismissed, but that the plaintiffs should proceed or the bill be dismissed with costs (1).

10. When an injunction has been obtained in a cause, which afterwards abates by the death of the defendant, the practice is to move, on the part of the defendant's representative, that the plaintiff may revive within a reasonable time (in *Stuart v. Ancell* (2) said to be a week generally), or that the injunction may be dissolved (3). Upon the revival of the suit against his personal representatives the injunction stands without further order (4).

11. The motion to dissolve must be made before the same judge as granted the injunction, and no other judge (except of a Court of Appeal) has authority to interfere with the order for an injunction (5). Where an injunction had been granted during the long vacation by the Master of the Rolls, in the absence of the Vice-Chancellor of England, in a cause which was marked for the Vice-Chancellor's Court, a motion to dissolve was directed to be heard also before the Master of the Rolls, and not before the Vice-Chancellor (6). Though, where a cause has been transferred from one branch of the Court to another, the latter has no jurisdiction to question the correctness of the exercise of judicial authority by the former on a previous application; yet, if it appears to the branch of the Court to which the cause has been transferred, that a plaintiff, on obtaining *ex parte* an injunction from the branch of the Court from which the transfer was made, had withheld information which might have induced that branch of the Court to make a different order; the injunction so obtained may be dissolved on that ground by the branch of the Court to which the

The motion to dissolve must (as a general rule) be made before the same judge as granted the injunction.

But where there has been a transfer of the cause from one Court to another, the latter will dissolve an *ex parte* injunction granted by the former, where information had been withheld from it.

(1) *Hinde v. Morton*, 2 H. & M. 368; *vide Adamson v. Hall*, 3 T. & R. 258, for the old practice on this point.

(2) *Infra*.

(3) *Stuart v. Ancell*, 1 Cox, 411; *Hill v. Hoare*, 2 Cox, 50.

(4) *Kennedy v. Lloyd*, 8 Ir. Eq. 581.

(5) *Paredes v. Lizardi*, 9 Beav. 490; *Mann v. Ricketts*, Ib. 4; *Bell v. Hull and Selby Railw. Co.* 1 Railw. Cas. 616.

(6) *Hammond v. Smith*, 15 L. J. (N. S.) Ch. 40.

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transfer was made (1). A Vice-Chancellor may make an order dissolving an injunction granted *ex parte* by the Lord Chancellor during the long vacation, there having been then no other Equity judge accessible; the Lord Chancellor, in granting the injunction, having directed that the defendants should be at liberty to move to dissolve it before the Vice-Chancellor. But the Court of Appeal has power to discharge the order of the Vice-Chancellor to dissolve, and to restore the injunction (2).

SECT. 5. *Evidence on the Motion, and Form of the Order to dissolve.*

Evidence on
the motion to
dissolve.

1. The motion to dissolve an injunction (which may be made before an answer is filed), must be supported by evidence (which is usually given by affidavit), produced on behalf of the defendant, in answer to that upon which the injunction was obtained; and the case thus made by the defendant may be met by counter evidence on the part of the plaintiff (3). If the motion is made after an answer has been filed, the answer of the defendant is, for the purpose of evidence on the motion, to be regarded merely as an affidavit, and affidavits may be received and read in opposition thereto (4).

2. Affidavits filed in support of statements introduced into the bill by amendment, after an injunction has been granted, and tending to support the injunction, cannot be read on a motion to dissolve that injunction (5).

3. Upon the hearing of the motion, the injunction will be continued or dissolved, according to the merits of the case, as shewn by the pleadings and evidence. If the Court is of opinion that the case made by the plaintiff is contradicted, or not supported, it will order the injunction to be dissolved, either with or without costs as the justice of the case may require (6).

(1) *Sturgeon v. Hooker*, 1 De G. & Sm. 484.

(2) *Pinchin v. London and Blackwall Railw. Co.*, 1 K. & J. 34; *George v. Watmouth*, 4 L. J. (N.S.) Ch. 61.

(3) *Dan Ch. Pr.* 4th Ed. 1515; *Kerr, Inj.* 626.

(4) 15 & 16 Vict. c. 86, s. 59.

(5) *Prince Albert v. Strange*, 1 Mac. & G. 47.

(6) *Spottiswoode v. Clarke*, 2 Phil. 154; 1 C. P. Coop. t. Cott. 254; 10 Jur. 1043; *Cory v. Yarmouth and Norwich Railw. Co.*, 3 Hare, 593;

4. The following is the form of the order to dissolve: "Upon motion, &c., by counsel for the defendant [(if plaintiff appears), and upon hearing counsel for the plaintiff], and upon reading the order dated, &c., the affidavits and answer (if any), [and (if plaintiff does not appear), an affidavit of service of notice of this motion on the plaintiff], this Court doth order that the injunction awarded by the said order, dated, &c., do stand dissolved" (1).

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solve.

5. If an undertaking as to damages has been given, the Court may give directions for the ascertainment of the amount, and order payment thereof to the defendant (2). But if the defendant does not satisfy the Court that the injunction ought to have been refused, or that it ought not to be continued, or if the Court considers that the defendant is estopped by his own laches or acquiescence, the motion will be refused and the injunction continued (3). In this case the form of the order will be as in *placitum* 4, *ante*, substituting "be continued until the hearing of this cause, or until the further order of this Court" for "do stand dissolved" (4).

6. In *Normanville v. Stanning* (5), upon a motion to dissolve an injunction to restrain proceedings in an action at Law on a bill of exchange, where an affidavit, on behalf of the defendant, of 100 folios in length, had been filed on the 25th of April—the motion coming on the 28th of April—the Vice-Chancellor said that the affidavit appeared to have been filed sufficiently long before the motion was made, to enable the plaintiff to meet it; but that even if the affidavit had been filed only the evening before, the plaintiff, having obtained an injunction to stay proceedings at Law, must be prepared to meet the application to dissolve it, and refused to direct the motion to stand over, until the deponent could be

Dalglish v. Jarvie, 2 Mac. & G. 231; 14 Jur. 945; *Great Western Railw. Co. v. Oxford, Worcester, and Wolverhampton Railw. Co.*, 5 De G. & Sm. 437; *Rochdale Canal Company v. King*, 2 Sim. (N. S.) 78; 15 Jur. 962; Seton, 3rd Ed. 942, 943.

(1) Seton, 3rd Ed. 941; *et vide* Ib. 942, No. 3.

(2) Dan. Ch. Pr. 3rd Ed. 1516; *vide* Seton, 3rd Ed. 868, No. 5.

(3) Dan. Ch. Pr. 3rd Ed. 1516; *Packington v. Packington*, 1 Dick. 101; *Bickford v. Shewes*, 4 My. & Cr. 498; *Att.-Gen. v. Burrows*, Ib. 128; *Anon.* 3 Atk. 485; *Feistel v. King's College, Cambridge*, 10 Beav. 491; 11 Jur. 506; *Glascott v. Lang*, 3 My. & Cr. 451; 2 Jur. 909; 2 Phil. 310.

(4) Seton, 3rd Ed. 941.

(5) 10 Hare, App. xx.

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examined, *vivâ voce*, under the 15 & 16 Vict. c. 86, s. 40; and said that the Court had, under the last clause of the section (40), a discretionary power of acting upon such evidence as might be before it at the time, and of making such interim orders or otherwise, as might appear necessary to meet the justice of the case.

SECT. 6. *Filing the Bill.*

1. By the Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86), s. 11, it is enacted that before the name of any person shall be used in any suit to be instituted in the High Court of Chancery, as next friend of any infant, married woman, or other party, or as relator in any information, such person shall sign a written authority to the solicitor for that purpose, and that such authority shall be filed with the bill or information. But in a pressing case—*Attorney-General v. Murray* (1)—upon an application for permission to file an information without the authority of the relator, under the above section, where it was desired to restrain a sale, to take place in Cornwall on the 16th, the application being on the 14th of the month, so that the necessary affidavit as to the authority of the relator could not be sworn until the bill was filed, and must be sworn in Cornwall, Vice-Chancellor Sir R. T. Kindersley made the order, upon the solicitor undertaking to file the authority on the 15th, and not to take any proceedings in the meantime.

2. Regularly, a printed copy of the bill should be filed (2); but a written copy may be filed of any bill of complaint praying a writ of injunction or a writ of *ne exeat regno*, or filed for the purpose, either solely or among other things, of making an infant a ward of the Court, upon the personal undertaking of the plaintiff or his solicitor to file a printed copy of such bill within fourteen days; and every bill of complaint so filed shall be deemed and taken to have been filed at the time of filing the written copy thereof (3). But in *Garland v. Riordan* (4) a plaintiff was relieved from the necessity of filing a printed bill in an injunction case where the

(1) 13 W. R. 65; 11 L. T. (N. S.) 332.

(3) 15 & 16 Vict. c. 86, s. 6; *Falkland Islands Company v. Lafone*, 3

(2) 15 & 16 Vict. c. 86, s. 1.

W. R. 561.

(4) 33 Beav. 448.

matter of the suit had been arranged under an order made prior to the expiration of fourteen days from the filing the written bill. In *Abington (Lord) v. Thornhill* (1), where a written bill had been filed, and an order made upon an undertaking by the defendant to stay all proceedings in the cause, whereby the plaintiff was precluded from filing a printed copy, as required by the 3rd Order of August, 1852, the Court, by consent, dispensed with the filing of a printed copy until further order, and retained the written bill on the file in the meantime. In a pressing case leave was given to file a written copy of a bill without any stamp, where the Stamp Office was closed for the day, on the undertaking by the plaintiff's solicitor to stamp the copy bill the next day (2). Where a bill (praying an injunction) had been filed in writing, duly stamped, as directed by the 6th of the Orders of the 25th of October, 1852, the Lords Justices, being of opinion that in such a case only one stamp was necessary, ordered a printed copy of the bill to be received and filed without a stamp; but directed that in all cases where a written bill had been filed, the same should be retained in the office together with the printed bill (3). And where, from the illness of the plaintiff's solicitor, a printed copy of a written injunction bill had not been filed within the time limited by the 3rd Order of August, 1852, it was held that the Master of the Rolls had properly ordered the bill to be restored to the file, and the printed copy to be received; and that, notwithstanding the 3rd Order, neither the plaintiff nor his solicitor should pay the defendant's costs occasioned by the omission to file a printed bill. Any judge of the Court may dispense with the General Orders of the Court where justice requires it (4). In *Robb v. Connor* (5), where the plaintiff's solicitor had inadvertently omitted to file the printed bill of an injunction bill filed in manuscript within the fourteen days required by the 58th section of the Chancery (Ireland) Act, 1867, the Court restored the bill to the file *nunc pro tunc*, allowed a printed copy of it to be lodged, and refused the defendant the costs of the motion made for this purpose.

Any judge of the Court may dispense with the General Orders of the Court where justice requires it.

(1) 24 L. J. (Ch.) 536.

App. lvii.

(2) *Kershaw v. Kalow*, 1 Jur. (N. S.) 974.

(4) *Ferrand v. Corporation of Bradford*, 8 De G. M. & G. 93; *Moss v. Sygers*, 9 Jur. (N. S.) 1220.

(3) *Jones v. Batten*, 22 L. J. (N. S.) Ch. 13; 2 De G. M. & G. 111; 9 Hare,

(5) Ir. Rep. 4 Eq. 574.

SECT. 7. *Service of the Bill.*

1. When the bill has been filed, a printed copy, stamped and indorsed, with a command to enter an appearance within eight days of the service of the bill, must be served on the defendant (1).

2. A written copy of any bill praying an injunction, &c., stamped and indorsed, may be served on the defendant, and such service has the same effect as the service of a printed copy; but there must be an undertaking by the plaintiff or his solicitor to file a printed copy within fourteen days (2).

3. The service of a copy of the bill must be effected by serving such copy personally (*i.e.* on the defendant himself), or by leaving the same with a servant of the defendant or some member of his family at his dwelling-house or usual place of abode, unless the Court directs some other mode of service (3).

4. The Court may direct substituted service of a copy of a bill to be served under the statute 15 & 16 Vict. c. 86, in cases in which, according to the practice of the Court existing at the time of the passing of that statute, substituted service of a *subpoena* to appear to and answer a bill might have been directed (4). If unsuccessful efforts have been made to effect service upon the defendants, the Court will direct substituted service to be made on a solicitor who has acted for them in transactions connected with the subject matter of the suit, and direct the bill to be served at the residence of the defendants abroad, where personal service had been found impracticable (5). And upon an application for an injunction to stay proceedings at Law by a party out of the jurisdiction, it will also direct substituted service of the bill upon the attorney in the action (6). The principle upon which substituted

The principle upon which substituted

service is ordered is, that there is reasonable ground to suppose that the service will come to the knowledge of the defendant. The Court will never direct substituted service unless it is clearly shewn that personal service is impossible.

(1) 15 & 16 Vict. c. 86, ss. 3, 4, and Schedule thereto.

(2) 15 & 16 Vict. c. 86, s. 6 (*vide* p. 1280, *ante*).

(3) Cons. Ord. x., r. 1; see Eden, Inj. 50-52; Dan. Ch. Pr. 4th Ed. 402-404; Morgan, Ch. Ord. 389.

(4) Cons. Ord. x., r. 2; Eden, Inj. 52.

(5) *Hope v. Carnegie*, L. R. 1 Eq. 126.

(6) *Sergison v. Beavan*, 9 Hare, App. xxix., *Hammond v. Walker*, 3 Jur. (N.S.) 686; Dan. Ch. Pr. 4th Ed. 404-408; Morgan, Ch. Ord. 390-392; Eden, Inj. 50-52.

that the service will come to the knowledge of the defendant (1). Substituted service is a matter with respect to which the Court is very jealous, and it will never direct it, unless it is clearly shewn that personal service is impossible (2).

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SECT. 8. *Service of Notice of Motion for an Injunction.*

1. Upon filing the bill and serving a copy on the defendant, a notice of motion for an injunction, without special leave of the Court, may be served personally, or at the dwelling-house or office of the defendant, if he shall not have caused an appearance to be entered within the time limited for that purpose (3). Substituted service will be ordered in a proper case, that is to say, where it can be made out that the ordinary service cannot be effected upon the defendant (4). After the appearance of the defendant the service of the notice of motion is to be made on his solicitor, or on the town agent of his solicitor (5). Each of the parties against whom it is intended to move for an injunction, must be served with a separate notice of motion (6).

2. Service of notice of motion upon a defendant before the time limited for his appearance has expired, is irregular, but in a special case justifying the immediate interference of the Court, special leave may be obtained to serve a party to the cause, before the time limited for his appearance has expired (7). But the fact of special leave having been granted must be stated in the notice (8). Leave to serve a notice of motion before appearance, does not include also leave to give short notice of motion; and if other than the regular period of notice is required, leave for that purpose must be obtained (9). It would appear that if the defendant files

(1) *Hope v. Hope*, 4 De G. M. & G. 328.

(2) *Firth v. Bush*, 9 Jur. (N. S.) 431; 11 W. R. 611.

(3) Cons. Ord. III., r. 8; Dan. Ch. Pr. 4th Ed. 1445.

(4) *Vide* p. 1282, *ante*, pl. 4.

(5) Cons. Ord. III.

(6) *Moseley v. Moseley*, 9 W. R. 531.

(7) *Hill v. Rimmell*, 8 Sim. 632; 2 Jur. 345; 2 My. & Cr. 641; *Harris v. Lewis*, 8 Jur. 1063; *Jacklin v. Wilkins* 6 Beav. 608; *vide* sect. 1, *ante*; *Hewitt v. Price*, 2 Coop. C. C. 168, n.

(8) *Hill v. Rimmell*, 8 Sim. 632; *Jacklin v. Wilkins*, 6 Beav. 608.

(9) *Hart v. Tulk*, 6 Hare, 611; *Newton v. Chorlton*, 10 Hare, App. xxxi.

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affidavits in answer to a motion for an injunction, he waives the irregularity of giving notice of motion before the time limited for appearance, without leave of the Court (1).

SECT. 9. *Form of Notice of Motion for an Injunction, and of Notice of the Time of making the Motion.*

1. The notice of motion must be properly entitled in the cause in which it is made (2), and must express before what judge the motion is intended to be made (3), and should state on whose behalf the motion is to be made (4). A motion cannot be made on behalf of the relators in an information, it must be made on behalf of the Attorney-General (5). Where the applicant is an infant (6), or a married woman, without her husband (7), or other person under disability, the motion is made by the infant, married woman, or other person, by a next friend (8).

2. A notice of motion must state the day on which the motion is to be made, which must be one of the days appointed for motions, unless special leave has been obtained to give the notice of motion for another day. The notice, however, though it expresses the day when the motion is to be made, usually adds, "or as soon after as counsel can be heard" (9); and whenever a motion is to be made by "special leave" of the Court, the notice must state that it is so made; otherwise, the party against whom it is to be made may disregard it (10). Unless the Court gives special leave to the contrary, there must be at least two clear days between the service of a notice of motion and the day named in the notice

(1) *Fitzgerald v. Bult*, 9 Hare, App. lxv.

(2) *Rowlett v. Cattell*, 2 Hare, 186; *Pollard v. Doyle*, 2 W. R. 509; Dan. Ch. Pr. 4th Ed. 1442.

(3) Cons. Ord. xxxiii., r. 1; Dan. Ch. Pr. 4th Ed. 1443.

(4) Kerr, Inj. 611.

(5) *Att.-Gen. v. Wright*, 3 Beav. 447; *et vide* Dan. Ch. Pr. 4th Ed. 1444.

(6) *Pidduck v. Boulbee*, 2 Sim. (N. S.) 223.

(7) *Pearse v. Cole*, 16 Jur. 214.

(8) Dan. Ch. Pr. 4th Ed. 1444.

(9) See *Re Electric Telegraph Company of Ireland, Ex parte Budd*, 10 W. R. 4.

(10) *Hill v. Rimmell*, 8 Sim. 632; 2 Jur. 45; 2 My. & Cr. 641; *Jacklin v. Wilkins*, 6 Beav. 607; *Moggridge v. Thomas*, 2 C. P. Coop. temp. Cott. 166; *Chambers v. Toynbee*, 12 W. R. 1100; Dan. Ch. Pr. 4th Ed. 1443; *do. Forms*, vol. 3, p. 53.

for hearing the motion, and in the computation of such two clear days, Sundays and other days on which the offices are closed, except Monday and Tuesday in Easter week, are not to be reckoned (1). The service of the notice of motion is effected by delivering a true copy of the notice to the person on whom the service is made (2).

3. A notice of motion must state clearly the terms of the order which will be asked for; and where the object is to discharge an order for irregularity, it is usual, but not necessary, to state the ground of the application (3). If it is intended to ask for the costs of the application, the notice should state such intention, otherwise, if the defendant neglect to appear, the costs of the motion will not be given (4); for where an order is taken upon an affidavit of service of the notice of motion, the party moving can only obtain that which is asked by the notice of motion. On *ex parte* applications the Court will not make an order for the payment of the costs by an absent person (5). But where the defendant appears on the motion, costs may be given though not asked for by the notice (6).

SECT. 10. *The Time for, and Order and Form of making the Motion for an Injunction.*

1. Unopposed motions, *ex parte* motions for an injunction, and motions for a writ of *ne exeat regno*, may be made on any day during the time the Court is sitting (7). If the Court be not sitting, special *ex parte* motions may be made before a judge of the Court at his private house; but in such cases the motion must be made before the judge who has cognisance of the cause, unless it be made during vacation (8). But the Court appoints special days during term, and the sittings after term, for the hearing of motions;

(1) Cons. Ord. xxxiii., r. 2; and see Cons. Ord. xxxvii., r. 2, and Dan. Ch. Pr. 3rd Ed. 412-414.

(2) Dan. Ch. Pr. 3rd Ed. 1445.

(3) *Brown v. Robertson*, 2 Ph. 173; *Lambert v. Hill*, 1 Dr. & War. 74; Dan. Ch. Pr. 4th Ed. 1443.

(4) *Pratt v. Walker*, 19 Beav. 261.

(5) *Nokes v. Gibbon*, 3 Jur. (N. S.) 282; 5 W. R. 216; *Cust v. Poyser*,

26 L. J. (Ch.) 353.

(6) *Clark v. Jaques*, 11 Beav. 623; *Butler v. Gardener*, 12 Beav. 525; Kerr, Inj. 612.

(7) *Chaffers v. Baker*, 5 De G. M. & G. 482; 1 Jur. (N. S.) 32.

(8) Dan. Ch. Pr. 4th Ed. 1441. As to orders during the vacation see Ord. vi., r. 11, and Dan. Ch. Pr. 4th Ed. 886.

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and whenever a motion of importance is required to be made on a day other than one of the days appointed for the hearing of motions, special leave must be obtained to give to the respondent notice of the motion for that day (1).

2. Motions for *ex parte* injunctions and writs of *ne exeat regno* take precedence of all other motions, and though made from behind the bar, such motions take precedence of motions of Queen's Counsel (2). Where several counsel state that they have respectively pressing motions to make, the Court calls on the senior counsel (3). Where notice of motion has been given for a certain day, that motion does not thereby obtain precedence on that day (4). On the last day of term the junior bar are first called upon, but *semble* their privilege is confined to unopposed motions (5).

3. According to the general rule of the Court, upon motion or seal days the judge calls upon each counsel in Court in turn, according to his seniority, to move (6); and each counsel, when called upon, has a right to make two motions before the next counsel is called upon. If, upon going through the Bar, all the motions are not exhausted, the same process is gone through, *toties quoties*, till all the motions are disposed of; but in the Court of Appeal, motions are set down in the paper, and called on in their order (7).

4. If counsel is unable to make a motion of which notice is given, on the day named, "or as soon after as counsel can be heard," he may save his notice of motion till the next motion or seal day (8); but if he omits either to make the motion or to save it, and if it be not saved, it will be treated as an abandoned motion (9); and the opposite party may, when all the motions are exhausted, or at the next motion or seal day, apply for his costs of the motion (10); and counsel for the motion, on being afterwards instructed, cannot subsequently save the motion till the next seal (11). But the motion

(1) *Anon.* 4 L. J. (Ch.) 204; *Chaffers v. Baker*, 2 W. R. 546; Dan. Ch. Pr. 4th Ed. 1442; Kerr, Inj. 612.

(2) 1 L. J. (Ch.) 60.

(3) *Soltan v. De Hield*, 15 Jur. 1151.

(4) *Ib.*

(5) *Ib.*

(6) *Ib.*

(7) Dan. Ch. Pr. 4th Ed. 1446.

(8) *Re Banwen Iron Company*, 17 Jur. 127; Dan. Ch. Pr. 4th Ed. 1446, 1450.

(9) *Cuthbert v. Fane*, 1 Jur. 890; *Turner v. Turner*, 15 Jur. 1165.

(10) Dan. Ch. Pr. 4th Ed. 1446, 1450.

(11) *Re Smith*, 23 Beav. 284.

may be saved at any time before the Court rises, and that, although the motions may have been finished (1). Where, however, a motion of which notice was given for the 29th of June was ordered on that day to stand over till the next motion day, the 6th of July, but was not then either brought on or saved, Vice-Chancellor Sir W. P. Wood held that the party moving was entitled to make the motion up to the close of the following motion day, being the 13th of July (2); and that, although an order had been made on the 13th of July for the costs of the motion as abandoned, that order being treated as made in the course of the then seal of the 13th of July, therefore not absolute until its close (3). But upon the motion being made, if counsel does not appear in opposition to the motion, it is granted on affidavit of service (4). If the affidavit of service is imperfect or irregular, the service cannot be subsequently verified, but a new notice of motion must be given (5). The order which is made on affidavit of service is in the terms of the notice. An order made on affidavit of service, is liable to be discharged, if there be any irregularity in the notice (6) or affidavit (7) on which it is founded; or if it adds to (8), or departs from, the terms of the notice (9); but an order which is less extensive than that asked by the notice, may be granted, if it will not prejudice the person against whom it is made (10). The Court will not, upon motion, make an order which will decide the principal point of the cause, unless with the consent, by counsel in Court, of all parties affected by it, and that consent cannot be inferred from non-attendance in pursuance of the notice (11). Nor will the Court,

The Court will not upon motion, make an order which will decide the principal point in the case, unless by consent.

(1) *Cass v. Bailey*, Smith, Ch. Pr. 248, n. (cited Kerr, Inj. 621.)

(2) *Wedderburne v. Llewellyn*, 13 W. R. 939; see *Woodcock v. Oxford, &c., Railw. Co.*, 17 Jur. 33.

(3) *Ib.*

(4) *Davidson v. Leslie*, 9 Beav. 104.

(5) *Barton v. Chambers*, 4 Beav. 547; *Angier v. May*, 3 W. R. 330.

(6) *Moody v. Hebbard*, 11 Jur. 941.

(7) *Solomon v. Stalman*, 4 Beav. 243.

(8) *Pratt v. Walker*, 19 Beav. 261;

Ex parte Carew, 23 L. J. (Ch.) 761.

(9) *Hutton v. Hepworth*, 6 Hare, 315; Dan. Ch. Pr. 4th Ed. 1448.

(10) *Hutton v. Hepworth*, 6 Hare, 315, 317; 12 Jur. 835; see *Powell v. Cockerell*, 4 Hare, 572; *Clark v. Jaques*, 11 Beav. 623; *Pratt v. Walker*, 19 Beav. 261.

(11) *Like v. Berresford*, 3 Bro. C. C. 366; *Skinners Company v. Irish Society*, 1 My. & Cr. 162, 164; *Tullett v. Armstrong*, 1 Keen. 428, 435; *sed vide Bailey v. Ford*, 13 Sim. 495.

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except by consent, extend the order upon a motion, beyond what is expressed in the notice (1).

SECT. 11. *Evidence on the Motion for an Injunction.*

1. An application for an injunction must (except in the case of a bill of interpleader (2)) be supported by affidavits, or the admissions of the defendant in his answer.

2. With respect to an interpleader bill, an application for an injunction is made by motion in the usual manner; and (except as to the affidavit of no collusion which must be annexed to or accompany an interpleader bill (3)) no affidavit of merits is required (4), but the money or other property in dispute, must be secured by payment into Court, or in some other manner (5). The injunction may be obtained *ex parte* if none of the defendants have appeared, but notice of motion must be given to those who have (6).

3. The defendant's answer is, for the purpose of evidence on a motion for an injunction, regarded as an affidavit of the defendant, and affidavits may be received and read in opposition thereto (7).

4. If the application is *ex parte*, and before the defendant has entered an appearance, there must also be a certificate, signed by one of the record and writ clerks, of the filing of the bill.

5. The affidavits on a motion for an injunction, though usually made by the plaintiff, may be made by any person acquainted with the facts (8). Thus an injunction was granted to restrain the publication of a work sold as the plaintiff's, upon an affidavit by the plaintiff's agent, the plaintiff himself being abroad (9). But

(1) Wyatt's P. R. 287; Dan. Ch. & Sm. 638, 643; *Jones v. Gilham*, G. Pr. 4th Ed. 1448; Kerr, Inj. 621. Coop. 49; *Vicary v. Widger*, 1 Sim.

(2) *Hamilton v. Marks*, 5 De G. & Sm. 638. 15; *Walbanke v. Sparks*, 1 Sim. 385.

(3) Mitford, Pl. 60; *Stevenson v. Anderson*, 2 V. & B. 407, 410; *Warrington v. Wheatstone*, Jac. 205. (6) *Warrington v. Wheatstone*, Jac. 205; *Vicary v. Widger*, 1 Sim. 15; *Hoggart v. Cutts*, Cr. & P. 199.

(4) *Wood v. Lyne*, 4 De G. & Sm. 16; (7) 15 & 16 Vict. c. 86, s. 59. (8) *Mollett v. Enequist*, 25 Beav. 609; *Kenuworthy v. Accunor*, 3 Madd. 550.

(5) *Sieveling v. Behrens*, 2 My. & Cr. 581; *Hamilton v. Marks*, 5 De G. Mer. 29. (9) *Byron (Lord) v. Johnston*, 2

an affidavit made by the solicitor of the party, or by any other person than the plaintiff himself, is not sufficient, unless a good reason be given for its not being made by the plaintiff himself (1). The affidavits must not be sworn until after the bill is filed, otherwise they cannot be read, as they have not been made in a cause (2). And an injunction obtained on affidavits sworn before the filing of the bill cannot stand (3).

6. Office copies of the affidavits must be in Court at the time of moving for the injunction; and injunctions have been dissolved, with costs, on the ground that the office copies of the affidavits upon which they were granted, were not actually in Court when the orders were pronounced (4). But sometimes in vacation, when matters pressed, the Court has taken affidavits into its own hand and considered them as filed (5).

7. An affidavit must be correctly intitled in the cause or matter in which it is made; but an affidavit which was properly intitled in the cause at the time it was filed, may be used, on a motion for an injunction, although the title of the cause has since been changed by amendment (6).

8. All affidavits must be taken and expressed in the first person of the deponent (7). The affidavit must commence by stating that the party "makes oath and says," for though the jurat express that the party was sworn, it will not be sufficient unless the affidavit also state that the party makes oath (8). Every affidavit must be divided into paragraphs, and every paragraph numbered consecutively, and, as nearly as may be, confined to a distinct portion of the subject (9). Each statement in the affidavit, must shew the means of knowledge of the person making the statement (10). The fact that an affidavit departs from the common form is a circum-

(1) *Spalding v. Keely*, 7 Sim. 377;
Scotson v. Gauty, 1 Hare, 91.

(2) *Francome v. Francome*, 11 Jur. (N. S.) 123; 13 W. R. 355; overruling *Fennall v. Brown*, 18 Jur. 1051.

(3) *Williams v. Davies*, 2 Coop. C. C. 172, n.

(4) *Jackson v. Cassidy*, 10 Sim. 326; *Elsey v. Adams*, 4 Giff. 398; 9 Jur. (N. S.) 788.

(5) *Att.-Gen. v. Lewis*, 8 Beav. 179.

(6) *Hawes v. Bamford*, 9 Sim. 563; *et vide* Dan. Ch. Pr. 4th Ed. 826.

(7) Cons. Ord. xviii., r. 1.

(8) *Phillipps v. Prentice*, 2 Hare, 542; 7 Jur. 528; *Re Newton*, 2 De G. F. & J. 3.

(9) 15 & 16 Vict. c. 86, s. 37.

(10) Ord. 5th Feb. 1861, r. 23.

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stance to excite the jealousy of the Court, unless a reason is shewn for the departure (1).

9. Affidavits filed before the date of the notice of motion cannot be read, unless notice of an intention to read them has been duly served on the opposite party. And the solicitors for the party against and for whom a motion is to be made need not search for affidavits filed further back than the day of the date of the notice (2). If it is intended to use an affidavit previously filed in the cause, notice of that intention must be served on the respondent (3); but if the respondent filed an affidavit in answer to the affidavit of the mover, that is a waiver of any objection on the ground of want of notice (4). On a motion for an injunction, counsel may make use of any affidavit filed before he addresses the Court (5). And in a very pressing case, an affidavit to be used upon a motion to dissolve an injunction, (in this case obtained on the morning of the day of the motion,) will be allowed to be sworn in open Court (6); but, except under very special circumstances (as where there might be a failure of justice or great inconvenience), the Court will not allow new evidence to be adduced on the motion after it has been opened (7). And this rule extends to the case of documents which it is proposed to verify *vivâ voce* by the attesting witness (8); but the Court may take notice of matters already given in evidence, and may refer to notes of the Court made on previous proceedings in the cause (9). And the Court of Appeal may, if it think fit, allow new evidence to be used before itself (10),

(1) *Woodhatch v. Freeland*, 11 W. R. 398.

(2) *Clement v. Griffith*, C. P. Coop. 470.

(3) *Clement v. Griffith*, C. P. Coop. 470; *Bowdler v. Bowdler*, 9 L. J. (Ch.) (N. S.) 394; *Lister v. Leather*, 3 Jur. (N. S.) 433.

(4) *Blackmore v. Glamorganshire Railw. Co.*, 5 Russ. 151.

(5) *Munro v. Wivenhoe and Brightlingsea Railw. Co.*, 13 W. R. 880; 12 L. T. (N. S.) 562.

(6) *Mercers' Company v. Great Northern Railw. Co.*, 14 Beav. 20.

(7) *East Lancashire Railw. Co. v.*

Hattersley, 8 Hare, 86; *Electric Telegraph Company v. Nott*, 11 Jur. 273; *Smith v. Swansea Dock Company*, 9 Hare, App. xx.; *Bird v. Lake*, 1 H. & M. 118; *Munro v. Wivenhoe, &c., Railw. Co.*, 13 W. R. 880.

(8) *Bird v. Lake*, 1 H. & M. 111.

(9) *Lister v. Leather*, 3 Jur. (N. S.) 433.

(10) *Const v. Barr*, 2 Russ. 161, 163; *Re Joseph and Webster*, 1 Russ. & My. 496; *Whitworth v. Whyddon*, 2 Mac. & G. 56; *Pole v. Joel*, 2 De G. & J. 285; *Re Dixon*, 3 Jur. (N. S.) 29.

unless the application is to discharge the order as having been made on insufficient evidence, in which case, the Court will only receive the evidence made use of on the former occasion (1). The Court has control over parties asking for an interlocutory injunction and their witnesses, and can make the parties submit to any terms, and if a proper case can be made out, the motion will be ordered to stand over to enable the defendant or plaintiff to answer the affidavits (2).

10. If the motion is not made on the day named in the notice, a party filing a further affidavit, ought to give notice of his having done so to the opposite party.

11. The party moving may save his notice of motion till a future day, where from the recent filing an affidavit requiring an answer, there is no time to answer it. And so the respondent in a similar case may ask that the motion may stand over.

12. If a plaintiff gives notice of his intention to read an affidavit, which he could not have read without notice, but declines to do so, the defendant is entitled to read it (3). An affidavit of service of the notice of motion must be filed before the rising of the Court on the day the motion is made (4); and the person who served the notice should make this affidavit, which is required to be used, in case the party served should not appear when the motion is made. This affidavit must state when, where, and how the notice was served, and by whom such service was effected (5), and it must say "notice in writing," or words to that effect (6). No order will be drawn upon an affidavit of service of a notice of motion, unless it is made and filed, at the latest, before the rising of the Court on the day on which the application is made (7). If this is not done, or the affidavit is not sufficient, a new notice of motion must be given (8), and an order taken upon an affidavit

(1) *Tanner v. Carter*, 1 C. P. Coop. temp. Cott. 337.

(2) *Electric Telegraph Company v. Nott*, 11 Jur. 273; *Besemeres v. Besemeres*, Kay, App. xvii.

(3) *Cauty v. Houlditch*, 14 Sim. 75.

(4) *Milltown (Lord) v. Stewart*, 8 Sim. 34; *Marshall v. Colehill*, 2 Coop. C. C. 172, n.

(5) See Cons. Ord. xxviii., r. 8, Dan. Ch. Pr. 4th Ed. 1445.

(6) *Hinde*, 452; *Wyatt's P. R.* 9; *Macauley v. Collier*, 1 Ves. 141.

(7) *Milltown (Lord) v. Stuart*, 8 Sim. 34.

(8) *Barton v. Chambers*, 4 Beav. 547.

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of service may be discharged for any irregularity in the affidavit, as for misnomer of a party in the suit (1).

13. Oral evidence may be made use of, and witnesses may be cross-examined upon any affidavits they may have made (2); unless otherwise directed by the Court, the examination and cross-examination take place before an examiner (3). In a proper case the Court will allow the motion to stand over, in order that a cross-examination may take place (4).

Evidence of belief is of no value at the hearing of the cause, but it is admitted on interlocutory applications.

14. In *Bird v. Lake* (5) Vice-Chancellor Sir W. P. Wood said that he had always understood the rule to be, that evidence of belief was, at the hearing of the cause, of no value whatever, but that on an interlocutory application it was always admitted, as putting the other side to answer it, and if not expressly denied was to be assumed for the purposes of the application to be in accordance with the facts. But the person making a statement must shew his means of knowledge (6).

15. The affidavits should contain no allegation of a fact not stated in the bill, and there must be no variance between the allegations in the bill, or the relief sought thereby and prayed, and the affidavits in support of, and making out the case in the bill (7).

16. An injunction granted on a motion must be such an injunction as is prayed by the bill (8). The Court only grants an injunction on a specific case, but general words in a motion for an injunction will be justified by establishing a specific case (9). If an injunction is applied for upon a distinct ground, which fails, it will not be granted upon another ground which has not been put forward, but which, it appears, might have been put forward in the circumstances of the case (10). In *Whitworth v. Gaugain* (11),

(1) *Solomon v. Stalman*, 4 Beav. 243.

(2) 15 & 16 Vict. c. 86, s. 40.

(3) Dan. Ch. Pr. 4th Ed. 837, *et seq.*

(4) *Normanville v. Stanning*, 10 Hare, App. xx.; *Besemer v. Besemer*, Kay, App. xvii.

(5) 1 H. & M. 111.

(6) Ord. 5th Feb. 1861, r. 23.

(7) *Darson v. Yates*, 1 Beav. 301; *Wattleworth v. Pitcher*, 2 Price, 189; *Stocking v. Llewellyn*, 3 L. T. 33; *Butts*

v. Matthews, 5 L. J. (N. S.) Ch. 134;

Burton v. Blakemore, 2 Jur. 1062;

Hertz v. Union Bank of London, 1 Jur. (N. S.) 127; *Att.-Gen. v. Greeces Company*, 1 Keen, 506; *Jones v. Latimer*, 1 Jur. 980.

(8) *Burdett v. Hay*, 33 L. J. (N. S.) Ch. 41.

(9) *Hertz v. Union Bank of London*, 1 Jur. (N. S.) 127.

(10) *Castelli v. Cook*, 7 Hare, 89.

(11) Cr. & Ph. 325.

Lord Chancellor Cottenham said, that when a party comes on motion to restrain another from doing an act, he is bound to tell the Court what the case is on which he relies, and that when he brings forward prominently and relies upon a given case, the Court will not allow him, if he should fail in that case, to spell out another, and say he might have framed his case, so as to shew a title to the relief asked; and a plaintiff who applies for an injunction upon a distinct ground, which fails, will not, in general, obtain an injunction upon another ground, which might have been put forward under the circumstances of the case (1).

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17. It is, in general, necessary that a plaintiff should swear positively to his title; and an injunction to restrain waste was refused where the plaintiff merely swore upon his information and belief that a settlement had been executed under which he was a remainderman for life (2); and so in another case to stay waste, a statement that the plaintiff was entitled to the fee simple of the estate was held insufficient, as it was necessary to set out a particular title (3); upon the same principle, it is required that where an application to restrain the violation of a patent right is made *ex parte*, or the validity of the patent is denied, the plaintiff should swear as to his belief at the time of making the application (and not as to his belief at the time he obtained the patent), that he is the original inventor (4). So upon a bill to restrain an infringement of copyright the plaintiff (except in cases falling within the 13th section of 5 & 6 Vict. c. 45) must shew that the assignment was in writing, if he is the assignee of an assignee, though it will be sufficient to state the assignment under which he himself claims without tracing the title through the mesne assignees (5). The title in a case of copyright may be either legal or equitable (6); but the person having the legal title must be made a party to the bill (7.)

It is, in general, necessary that a plaintiff should swear positively to his title.

(1) *Hertz v. Union Bank of London*, 1 Jur. (N. S.) 127.

(2) *Davies v. Leo*, 6 Ves. 784.

(3) *Whitelegg v. Whitelegg*, 1 Bro. C. C. 57.

(4) *Hill v. Thompson*, 3 Mer. 622, 624; *Sturz v. De la Rue*, 5 Russ. 322, 328; *Whitton v. Jennings*, 1 Dr. & Sm. 110; *S. C. sub. nom. Whitten v. Jennings*,

6 Jur. (N. S.) 164; *Mayer v. Spence*, 1 J. & H. 87; 6 Jur. (N. S.) 672.

(5) *Morris v. Kelly*, 1 J. & W. 481.

(6) *Mawman v. Tegg*, 2 Russ. 391; *Sheriff v. Coates*, 1 Russ. & My. 167; *Chappel v. Purday*, 4 Y. & C. 485; *Bohn v. Bogue*, 10 Jur. 420.

(7) *Colburn v. Duncombe*, 9 Sim. 151.

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18. The evidence must also prove some actual violation of the plaintiff's rights, or a threat of violation, or some fact, and not mere belief. Thus in cases of waste an affidavit merely as to belief, or that the deponent is credibly informed that the defendant intends to commit waste, without stating any grounds for it, will not be sufficient; there must either be some fact, like the sending a surveyor to mark out trees, or some threat (1).

19. The affidavits in support of an *ex parte* injunction, should always state the precise time at which the plaintiff, or those acting for him, became aware of the threatened injury (2). They must shew either that notice to the defendant would be mischievous, or that the mischief is so urgent, that it would be done if notice were served on the defendant before the injunction could be obtained. If the affidavits fall short of this point, the motion will be ordered to stand over, and notice of it must be served on the defendant (3).

20. If the application for an injunction or writ of *ne exeat regno*, is *ex parte*, the party applying must deliver copies of the affidavits upon which it was granted, upon payment of the proper charges, immediately upon the receipt of a written request and undertaking as to charges, or within such time as may be specified in such request, or may have been directed by the Court (4).

21. Any party in a cause or matter, may require the attendance of any witness before an examiner of the Court, or before an examiner specially appointed for the purpose, and may examine such witness orally, for the purpose of using his evidence upon any motion or other proceeding before the Court; and any party having made an affidavit to be used on any motion or other proceeding is bound, on being served with a *subpoena*, to attend before an examiner for the purpose of being cross-examined (5). But

(1) *Gibson v. Smith*, 2 Atk. 182; *Jackson v. Cator*, 5 Ves. 688; *Hanson v. Gardiner*, 7 Ves. 305, 309; *Etches v. Lance*, Ib. 417; *Hannay v. M^rEntire*, 11 Ves. 54.

(2) *Culvert v. Gray*, 2 Coop. C. C. 171, n.

(3) *Anon.* 1 L. J. (Ch.) 4.

(4) Ord. xxxvi., r. 9; *vide* Ib. rr. 4, 5, 6.

(5) 15 & 16 Vict. c. 86, s. 40; *Besemeres v. Besemeres*, Kay, App. xvii.; *Normanville v. Stanning*, 10 Hare, App. xx.; *Clarke v. Law*, 2 K. & J. 28; *Lloyd v. Whitty*, 19 Beav. 57; *Nicholls v. Ibbetson*, 7 W. R. 430; *Edwards v. Spaight*, 2 J. & H. 617; *Singer Sewing Machine Manufacturing Company v. Wilson*, 2 H. & M. 584; Dan. Ch. Pr. 4th Ed. 822, *et seq.*

the Court has a discretionary power of acting upon such evidence, as may be before it at the time of the application, and of making such interim order or otherwise, as may appear necessary to meet the justice of the case (1). However, no weight is to be attached to an affidavit where the opposite party has had no opportunity to cross-examine the witness (2). Unless a defendant gives notice that he intends to read his answer on the application, he cannot on an interlocutory motion for an injunction be cross-examined upon it; but on a motion for a decree, the answer being in that case an affidavit, the defendant can be cross-examined upon his answer (3). A witness cannot be cross-examined in open Court upon an interlocutory application, but only at the hearing of the cause, and in those cases in which issue has been joined by filing a replication (4). But in *Nicholls v. Ibbetson* (5), upon a motion for an injunction, an order was made for the attendance of the defendants, for the purpose of being examined in open Court *vivâ voce*, on the ground that the witnesses proposed to be examined were all defendants.

22. The Court will not allow a motion (in this case to dissolve an injunction to restrain proceedings in an action on a bill of exchange) to stand over, in order to allow witnesses who have made an affidavit, to be examined *vivâ voce*, if it is satisfied that the application is made for the purpose of creating delay (6); nor in a patent case, in order to allow a witness (in this case the plaintiff, who had made an affidavit of his belief of title to, and infringement of a patent) to be cross-examined, if it is satisfied that the plaintiff has, by making the affidavit, done enough to entitle him to proceed at Law to try his legal title (7).

23. If sufficient *primâ facie* evidence of a case for an injunction is produced on the motion, the Court will grant the injunction, unless the defendant produce evidence rebutting that *primâ facie* evidence (8). And in *Scott v. Becher* (9) it was held that if, in

(1) 15 & 16 Vict. c. 86, s. 40.

(5) 7 W. R. 430.

(2) *Wightman v. Wheelton*, 23 Beav. 397; 3 Jur. (N. S.) 124.(6) *Normanville v. Stanning*, 10 Hare, App. xx.(3) *Ib.*(7) *Mayer v. Spence*, 1 J. & H. 87.(4) Ord. 5th Feb. 1861, rr. 7, 19, 21; *Bodger v. Bodger*, 11 W. R. 80.(8) *Bell v. Wilson*, 34 L. J. (Ch.) 572.

(9) 4 Price, 346.

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support of an application for an injunction to restrain the transfer of stock into the names of a *feme covert* administratrix and her husband, on the ground of insolvency and of their being abroad, the plaintiff would swear to his belief of insolvency, and the defendants by their affidavits did not clearly negative that allegation, an injunction ought to be granted; for that where a party swears to his belief of a circumstance which must, if true, be in the knowledge of the person whom the statement is meant to affect, and he will not deny it, such belief is sufficient to induce the Court to take the circumstances as acknowledged; but if the equity of the bill is falsified by the affidavits on the other side, the Court will not grant the injunction (1). And it is not sufficient on a motion to dissolve an injunction, that the defendant merely brings into dispute and questions the statements of the plaintiff (2); nor, on such a motion, there being no answer, will the Court dissolve the injunction upon the sole ground, that the plaintiff's equity is denied by the defendant's affidavit, where the affidavit does not traverse all the facts on which the plaintiff's equity rests (3).

24. If, upon the motion for an injunction, the evidence, as to the material facts, was contradictory, the Court, under the old practice, would direct an issue to inform its conscience (4). In *M'Curdy v. Noak* (5) the Court refused an injunction, on the ground that the evidence of the plaintiff and defendant was altogether conflicting, and an inspection of the defendant's shaft (to prohibit the proceeding with which, the injunction was moved for), was impracticable, from being filled with water.

SECT. 12. *The Effect of Pleadings, and of Changes in the Pleadings.*

1. An amendment of the bill under an order of course, is a waiver of a notice of motion for an injunction already given, and

(1) *Sanxter v. Foster*, Cr. & Ph. 302.

(3) *Pyecroft v. Pyecroft*, 2 Sm. & G.

(2) *Palin v. Gathercole*, 1 Coll. 565; 326.

Scott v. Becker, 4 Price, 346.

(4) *De Tastet v. Bordenave*, Jac. 516.

(5) 17 L. J. (N. S.) Ch. 165.

the plaintiff must pay the defendant's costs of the motion (1). If the plaintiff wishes to save his notice of motion, he should make a special application for leave to amend without prejudice to the notice (2). After amending a bill for an injunction, it is irregular to move on a notice of motion given before the amendment, because such a notice, would be a notice on a record no longer in existence, and on the existing record there would be no notice of motion (3). In *Rawlings v. Lambert* (4) leave was given to amend the bill, without prejudice to a notice of motion for an injunction, which had been given before a demurrer to the bill had been allowed, the Vice-Chancellor remarking that it was only a question of costs.

2. The mere obtaining an order to amend will not, of itself, dissolve an injunction; and, unless the record has been actually and materially altered, the injunction is not gone (5); and if the amendments are merely formal, or the merits of the case remain untouched, or the constitution of the suit is substantially unaltered, the injunction remains, an injunction not being, in general, dissolved by a subsequent amendment of the bill (6). An order to amend does not affect the injunction, whether expressed to be without prejudice or not; and it is not necessary, though usual, for the order (one of course) giving leave to amend to state that the amendment is made "without prejudice to the injunction" (7); and an injunction, if granted upon merits, is not dissolved by the amendment of the bill, though the amendment be without saving the injunction (8). When a demurrer is filed, the plaintiff is nevertheless at liberty, before it has been argued, to obtain an order

(1) *London and Blackwall Railw. Co. v. Limehouse Board of Works*, 3 Kay & J. 123; *Monypenny v. —*, 1 W. R. 99; *Smith v. Dixon*, 12 W. R. 934.

(2) *Martyn v. Fust*, 8 Sim. 199; *Gouthwaite v. Rippon*, 1 Beav. 54; *Child v. Douglas*, Kay, 574; *Monypenny v. —*, 1 W. R. 99.

(3) *Gouthwaite v. Rippon*, 1 Beav. 54.

(4) 1 J. & H. 458, 469; *vide* p. 1301, *post*, pl. 12.

(5) *Davis v. Davis*, 2 Sim. 515.

(6) *Warburton v. London and Blackwall Railw. Co.*, 2 Beav. 253; *Brooks v. Purton*, 1 Y. & C. Ch. 271; 6 Jur. 94; *Kennedy v. Lewis*, 14 Jur. 166; Dan. Ch. Pr. 4th Ed. 1514; Kerr, Inj. 635.

(7) *Warburton v. London and Blackwall Railw. Co.*; 2 Beav. 253; Seton, 873, 3rd Ed.; Dan. Ch. Pr. 4th Ed. 385, 1515.

(8) *Harvey v. Hall*, L. R. 11 Eq. 31; 23 L. T. (N. S.) 391.

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of course to amend his bill, and the amendment will not prejudice the injunction already obtained (1). Where an answer is put in, displacing the plaintiff's equity, and entitling the defendant to dissolve an injunction, the Court will not grant leave to amend without prejudice to the injunction (2); but where the answer stated facts which were a surprise on the plaintiff, the Court granted leave (3). But where an injunction had been granted to restrain the defendant from doing certain acts, until he should fully answer an information and bill, or the Court should make order to the contrary, the parties who had obtained an injunction, had made it impossible for the defendant to answer the information and bill on which the injunction had been obtained, inasmuch as the record had been so metamorphosed by the addition of a co-plaintiff that the old information and bill no longer existed; and the parties who obtained the injunction had, by amending the record in the way they had done, made it impossible for the defendant to avail himself of the contingency mentioned in the order; the Court held, that the injunction was gone (4).

3. In *D'Arcy v. Sumner* (5) it was held that a supplemental bill, does not put an end to an injunction.

4. The Court will not grant an injunction if the bill contains any scandalous matter; and where (under the old practice), a bill had been referred for scandal, and was reported scandalous, it was held that no motion could be made on it for an injunction, until the scandalous matter was expunged, for, till then, it was not known what the bill was, and the defendant could not answer it (6). All injunctions being now special, and on the merits, the old practice with reference to dissolving the injunction, called the common injunction (7), upon exceptions to the answer for insufficiency, is now obsolete (8).

(1) *Warburton v. London and Blackwall Railw. Co.*, 2 Beav. 253.

Sharp v. Ashton, 3 V. & B. 144; *King v. Turner*, 6 Madd. 255.

(2) *Penfold v. Stoveld*, 3 Madd. 471;

(5) 2 Moll. 359.

et vide Mollett v. Enequist, 26 Beav. 466.

(6) *Davenport v. Davenport*, 6 Madd.

(3) *Vesey v. Wilks*, 3 Madd. 475.

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(4) *Att.-Gen. v. Marsh*, 16 Sim. 572;

(7) *Vide p. 1, ante.*

(8) As to the old practice, *vide* *Drewry*, Inj. 99, 351, 412-415.

5. An injunction cannot, in general (1), be granted while a demurrer or plea, or both, are pending (2). When the defendant demurs he informs the Court, upon the record, that there is no equity in the bill (3). To remedy as much as possible the delay occasioned by this species of defence, the Courts will always advance and permit a plea or demurrer to an injunction bill to be argued immediately and out of their regular course (4). But although in general, where an injunction bill is impeded by a demurrer or plea, the Court will advance or accelerate the demurrer (5) or plea (6) where pressing reasons are shewn for doing so; because until the demurrer or plea is disposed of, the injunction cannot be obtained; yet it will not be done if there is great delay unaccounted for, as, for instance, where the bill was filed in respect of the assets of a testator, three years after his death, and no reason given why it was not filed sooner, although in this case it was sworn that there was a considerable sum of money in the defendant's hands, and a dispute in the Ecclesiastical Court as to probate, and danger of the money being lost (7).

6. If the demurrer or plea is neglected to be set down for argument, or, if set down, is abandoned by the defendant's counsel, or is overruled, the plaintiff may immediately move for an injunction (8).

7. As a defendant may plead to part, demur to part, and answer to the rest of the bill; if, upon argument, either plea or demurrer should be overruled, the plaintiff will be entitled to move, upon that suggestion, for an injunction; and even if both plea and demurrer should be overruled, some equity may still be shewn for granting or continuing an injunction; thus, where there was a

(1) *Vide* p. 1300, *post*, pl. 9.

(2) *Anon.* Sel. Ca. Ch. 24; *Humphreys v. Humphreys*, 3 P. Wms. 396; *Cousins v. Smith*, 13 Ves. 164.

(3) *Cousins v. Smith*, 13 Ves. 167.

(4) *Cousins v. Smith*, 13 Ves. 164; *Jones v. Taylor*, 2 Madd. 181; *Const v. Harris*, T. & R. 510, n.; *Anon. v. Bridgewater Canal Company*, 9 Sim. 378; *Eden*, Inj. 61-64; *Drewry*, Inj. 356; *Kerr*, Inj. 619.

(5) *Jones v. Taylor*, 2 Madd. 181;

Cousins v. Smith, 13 Ves. 167.

(6) *Anon.* 2 Atk. 113; *Humphreys v. Humphreys*, 3 P. Wms. 395.

(7) *Jones v. Taylor*, 2 Madd. 181.

(8) *Cloughton v. Hadwell*, 6 Madd. 299; *Rashleigh v. Buller*, Dick. 153; *Franklyn v. Thomas*, 3 Mer. 225, 234; *Farquharson v. Pitcher*, 2 Russ. 81; 1 Fowl. (Ex.) Pr. 235, 236; *vide Lamb v. Bowes*, Bunb. 11; *Ram v. Bradbury*, Ib. n.

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demurrer, plea, and answer to an injunction bill, and the demurrer was overruled, and the plea ordered to stand for an answer, with liberty to except, yet an injunction was granted upon the merits confessed in the answer (1).

8. Where the plaintiff had served the defendants with notice of a motion for a special injunction, and the defendants afterwards filed a demurrer to the bill; the Vice-Chancellor ruled that, under these circumstances, the demurrer must be set down and argued *instanter* (2). It is the usual course for the demurrer and motion to be argued together (3).

9. The pendency of a demurrer does not prevent the plaintiff from serving the defendant with a notice of motion (4). In this case, after a demurrer to the bill had been filed, the plaintiff served the defendant with a notice of motion, that he might be ordered to deliver certain deeds and papers to the receiver in the cause, and the Vice-Chancellor said that he did not think that the mere fact of putting a demurrer on the file, could prevent the plaintiff from giving a notice of motion, and that a case might arise of the most imminent danger, as, for instance, if a person were going to take a ward of the Court out of the jurisdiction, and then a demurrer should be filed, would the mere pendency of the demurrer prevent a motion from being made to restrain the party from taking the ward out of the jurisdiction?

10. Where a demurrer has been put in, and any advantage has been gained at Law by the defendant in Equity, in consequence of the pendency of the demurrer, it is proper that the parties, upon its being overruled, should be placed in the situation in which they would have been, if the demurrer had never been filed; as observed by Lord Chancellor Eldon in *Franklyn v. Thomas* (5). "The principle is this:—While it is in contemplation whether a good case can be made or not, if it turns out that there is an equitable case, in the result of the demurrer, then to deal with it as an equitable case from the first; and that it is the bounden duty of the Court to interfere, and place the defendant where he would

(1) *Mansfield v. Cook*, 1 Fowl. (Ex.) Pr. 236; Eden, Inj. 62.

(2) — v. *The Bridgewater Canal Company*, 9 Sim. 378.

(3) Seton, 872, 3rd Ed.

(4) *Wardle v. Claxton*, 9 Sim. 412.

(5) 3 Mer. 225, 235.

have been, but for an untenable defence." In this case the defendant in Equity, pending a demurrer which he had put in, had taken the plaintiff in execution, the demurrer was afterwards overruled, and the then common injunction obtained. Lord Eldon, upon motion, discharged the plaintiff out of custody; but as the judgment had been satisfied by the plaintiff having been taken in execution, and if he had been discharged the debt would have been lost, it was done upon the terms of his undertaking again to confess judgment. So, in the case of *Raphael v. Birdwood* (1), where, in consequence of a demurrer having been put in (which was afterwards overruled), and the argument having been postponed for the convenience of the defendants' counsel, the plaintiff had been prevented from obtaining the then common injunction, this principle was attended to, and a special motion for an injunction to stay trial, without the previous order for the then common injunction, was granted.

11. An injunction "until answer or further order," or "until answer with liberty to apply," is not dissolved *ipso facto* by putting in a sufficient answer, but remains in force until it is discharged by the order of the Court (2). But a motion to dissolve it will not be entertained, until the plaintiff has had reasonable time to consider whether the answer is sufficient (3).

12. The allowance of a demurrer to the whole bill (*i.e.*, a general demurrer), puts an end to an injunction previously obtained, and this is so, though liberty be given to amend (4). But the Court, upon allowing the demurrer, will, in a proper case, give leave to amend the bill without prejudice to a notice of motion for an injunction, as where the demurrer is allowed on a technical ground (5).

13. Although a plea to the whole bill, if allowed, is to be considered as a full answer, yet if the plaintiff has already obtained

(1) 3 Mer. 229, n.

(2) *Ooddeen v. Oakley*, 2 De G. F. & J. 161; *vide* sect. 2, pl. 6, *ante*.

(3) *Gibson v. Chayters*, 8 Beav. 167; but see *Stanley v. Bond*, 5 Beav. 175; *Cresy v. Beavan*, *Ib.* 177, n.

(4) *Schneider v. Lizardi*, 9 Beav. 461, 468; Newland's Pr. 3rd Ed 354;

Hinde's Pr. 598; Harrison's Pr. 548; Wy. Pr. Reg. 235, 243.

(5) *Harding v. Tingey*, 10 Jur. (N. S.) 872; 34 L. J. (Ch.) 13; 12 W. R. 817; 10 L. T. (N. S.) 323; *vide Rawlings v. Lambert*, 1 J. & H. 458, 469; *vide* p. 1297, *ante*, pl. 1.

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an injunction until "answer and further order," the injunction will remain, and is not dissolved by the allowance of the plea; but the defendant may obtain an order to dissolve the injunction (1).

14. The fact that a suit becomes defective by the bankruptcy of the plaintiff, does not dissolve an injunction (2). But where a defendant becomes bankrupt after an injunction has been obtained (in this case *ex parte*, to restrain the publication of a work by the defendant), he may move to dissolve without his assignees being made parties; and if the Court thinks it necessary to protect the interest of the assignees, and that injustice would be done by allowing the injunction to continue, it will dissolve it though the assignees are not before the Court (3).

15. An injunction is not dissolved by an abatement of the suit, by the death of either the plaintiff or defendant (4).

SECT. 13. *Dismissal of the Bill.*

Upon dismissal of bill, injunction falls.

1. If the bill in an interpleader suit is dismissed, it is not regularly necessary, although it was a very general practice, to apply for an order to discharge the injunction; for when the bill is dismissed, in strictness, the injunction falls *ipso facto* (5). If any bill praying an injunction is dismissed, an injunction granted (on the merits or otherwise) on that bill falls with it, and no express motion or order is necessary to dissolve the injunction (6).

An injunction does not prevent dismissal.

2. An injunction having been obtained, does not of itself prevent the bill being dismissed, and the principle is, that after an injunction has been obtained, if the plaintiff takes no step during the time prescribed, the defendant may move to dismiss the bill for want of prosecution, and that, although there is an order for staying execution, or trial, or even sometimes the commencement

(1) *Philips v. Langhorn*, Dick. 148;
Ferrand v. Hamer, 4 My. & Cr. 143,

147.

(2) *Et vide* p. 1275, *ante*, pl. 7.

(3) *M^cBeath v. Ravenscroft*, 8 L. J. (N. S.) Ch. 208; *Randall v. Mumford*, 8 Ves. 424; *Caird v. Campbell*, 1 Moll. 484.

(4) *Vide* pp. 1276, 1277, *ante*, pl. 9, 10.

(5) *Blennerhasset v. Scanlan*, 1 Hog. 363; *Drew. Inj.* 419.

(6) *Green v. Pulsford*, 2 Beav. 70; *Hannam v. South London Waterworks Company*, 2 Mer. 63; *Day v. Snee*, 3 V. & B. 171; 1 C. P. Coop. Cas. 591.

of an action (1). In those cases the bill is dismissed, and of course the injunction ends (2). But if any transaction between the parties renders the motion to dismiss the bill inconsistent with justice, the Court will advert to that transaction, on a motion to discharge the order for dismissal (3); and, therefore, where an order (then of course) dismissing a bill for want of prosecution, which had been obtained after an injunction had been granted restraining the defendant from proceeding in an action at Law, on the plaintiffs undertaking to give judgment to be dealt with as the Court should direct, and not to bring any writ of error, the Court discharged this order to dismiss, and held that the bill could not be dismissed on motion without notice (4).

3. It has also been decided, that the pendency of a notice of motion to dissolve an injunction, the motion not having come on by reason of the press of business of the Court, does not make it irregular to obtain an order to dismiss for want of prosecution (5). Shewing cause (under the old practice) against dissolving an injunction, was held not such a proceeding in a cause as to prevent a bill being dismissed for want of prosecution (6); and a bill was dismissed for want of prosecution, notwithstanding an injunction had been ordered to stand over, with liberty to bring an action, where no steps had been taken in the action for some months after an answer had been put in, denying infringement of a patent (7).

4. A plaintiff may, notwithstanding the pendency of a motion for an injunction, obtain an order dismissing his bill with costs (8). But Lord Justice Turner said it was desirable to get the certificate of the taxing master, whether the costs of a pending motion, were costs in the cause; but that he was certainly not inclined to interfere, whatever the established rule in this case might be, as to the costs of a motion for an injunction (9).

(1) *James v. Biou*, 3 Sw. 244; *Day v. Snee*, 3 V. & B. 170; *Naylor v. Taylor*, 16 Ves. 127; *Desgraves v. Lane*, 15 Ves. 291; *Stagg v. Knowles*, 3 Hare, 241.

(2) *James v. Biou*, 3 Sw. 245.

(3) *Ib.*

(4) *James v. Biou*, 3 Sw. 234, 245, 246, 247.

(5) *Farquharson v. Pitcher*, 3 Russ. 383.

(6) *Warwick (Duke of) v. Beaufort (Duke of)*, 1 Cox, 111.

(7) *Baker v. M'Clellan*, 27 L. J. (Ch.) 57.

(8) *Markwick v. Pawson*, 33 L. J. (Ch.) 703.

(9) *Ib.*

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5. The dismissal of a bill for an injunction does not prejudice the right of the plaintiff to file a new bill, founded on a new or altered state of circumstances (1), or upon new facts (2). If the dismissal has been with costs, a second motion for the same object cannot be made, until those costs have been either paid or secured by payment (3).

SECT. 14. *Orders and Injunctions obtained on Interlocutory Applications—Interim Restraining Orders and Injunctions and Interlocutory Injunctions.*

Interim
orders.

1. Interim orders are temporary *ex parte* injunctions, or interim restraining orders in the nature of injunctions, which are granted when the plaintiff not shewing quite a case for an *ex parte* injunction, without more, shews a case for giving short notice of motion for an injunction, and for protection in the meantime. The interim order is therefore an injunction or restraining order, obtained *ex parte*, to be in force until after a day named, with liberty (if required) to serve a notice of motion for an injunction on the day before that day, when the question of the right to an injunction would be disposed of, on the notice of motion. If a proper case is shewn, the Court will grant an interim order, extending over and including a named day, the next motion day more usually, or if necessary, some earlier day, with liberty for the defendant to move sooner to discharge the same on notice, and liberty to the plaintiff to move similarly for an injunction. In such a case, on the motion by the defendant to discharge the order, the plaintiff, if he elect to move at once for an injunction, has the right to begin (4). An interim order is usually accompanied by putting the plaintiff on terms, to give an undertaking for any damage done to the defendant, by the interim order (5). If it is desired that the writ of injunction should not issue, the terms of the order should be, that

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| (1) <i>Mayor of Liverpool v. Chorley</i> | <i>pany</i> , 3 De G. M. & G. 304, 341. |
| <i>Waterworks Company</i> , 2 De G. M. & G. | (3) <i>Oldfield v. Cobbett</i> , 12 Beav. 91; |
| 852; <i>Castelli v. Cook</i> , 7 Hare, 89, 99. | <i>Burdett v. Hay</i> , 33 Beav. 189. |
| (2) <i>Att.-Gen. v. Sheffield Gas Com-</i> | (4) <i>Fraser v. Whalley</i> , 2 H. & M. 10. |
| | (5) Seton, 3rd Ed. 867. |

the party "be restrained," and not that "an injunction should be granted to restrain" him (1).

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2. Interim orders, though generally granted upon *ex parte* applications, may also be granted where the motion is on notice, or the pleadings shew issues raised, which must be discussed at the hearing (2).

3. Interim orders do not (as *ex parte* injunctions do) put the other side to the necessity of coming to the Court to dissolve them; but it is necessary that the Court should be informed of every fact, whenever an interim order is asked for; however, this rule ought not perhaps to be carried to that extreme degree of nicety, to which it formerly was, in the case of *ex parte* injunctions, when the very smallest scrap of paper that was omitted, was held almost to disentitle to the injunction (3). In this case the Vice-Chancellor, Sir W. P. Wood, said, that the Court ought to have known that the parties had been *de facto* standing at arm's length since the 27th of January, (the interim order having been obtained on the 16th of March,) and therefore that there had been great delay, which might be of considerable importance at the hearing of the cause, and certainly was of great importance, upon the first application for the interim order (4).

It is necessary that the Court should be informed of every fact, whenever an interim order is asked for.

4. The form of an interim order is as follows: "Upon motion by counsel for the plaintiff, and upon reading the record and writ clerk's certificate of the filing of the bill, and the affidavits, &c., in support, and the plaintiff by his counsel undertaking to abide by any order the Court may make as to damages, in case the Court should thereafter be of opinion that the defendant had sustained any by reason of the order, which the plaintiff ought to pay: Let the defendant, his servants, workmen, and agents, be restrained from (*the act enjoined*) until after (*a day named*) or until the further order of the Court; and (*if so*) let the plaintiff be at liberty to serve the defendant with a notice of motion for (*a day named*) for an injunction in the cause" (5).

Form of an interim order.

(1) *Drewry*, Inj. Sup. 84; *Kerr*, Inj. 212; *Goldsmid v. Croft*, 4 W. R. 450; *Turner v. Turner*, 15 Jur. 218.

(2) *Coleman v. West Hartlepool Railw. Co.*, 3 L. T. (N. S.) 847.

(3) *Fuller v. Taylor*, 32 L. J. (N. S.) Ch. 376, 377.

(4) *Ib.*

(5) *Seton*, 3rd Ed. 867; *et vide* p. 1304, *ante*, pl. 1.

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SECT. 14.*Ex parte*
injunctions
(including
interim
orders).A party apply-
ing for an *ex*
parte injunc-
tion is bound
to put the
Court in pos-
session of
all the facts.

5. *Ex parte* injunctions (including therein interim orders), are obtained upon special *ex parte* motions. Such motions are not limited to the ordinary motion days, but may be made to the Court at any time during its sittings; or, if the Court be not sitting, they may be made to one of the judges, at his private house: in such cases the motion must be made before the judge to whose Court the cause is attached, unless it is made during vacation (1). The Court deals with great strictness and severity with persons who apply for *ex parte* injunctions. The party applying is bound to put the Court in possession of all the facts, in order to enable it to judge whether the defendant ought to be put to what may be occasionally a very serious evil, viz., a temporary injunction (2). When a plaintiff applies *ex parte* for a special injunction, he is bound to state in his bill every material fact, and set out every material document, bearing upon the subject-matter of the litigation (3). Where, therefore, a plaintiff omitted a material letter written by the defendant, and the attention of the Court was not pointedly called to such letter on the application for the *ex parte* injunction, the Court immediately discharged the order for the injunction, and directed restitution of possession of certain premises, the question in the suit (4). Parties coming for an injunction *ex parte* must state their case fully and fairly to the Court; if they do not, they will be made to pay costs, even though successful (5). It sometimes happens, that upon an application *ex parte* for an injunction, the Court will, if it thinks that the case is not so urgent as to require its immediate interference, or that the affidavits in support of it are not sufficiently positive, and might be contradicted, order notice of the motion to be given to the defendant (6). In such cases, if the defendant has not appeared, the notice of motion must express, that leave has been obtained of the Court to serve it (7).

Form of the
order for an
ex parte
injunction.

6. The form of an order upon an *ex parte* application for an

(1) As to orders made during vacations, see Cons. Ord. VI., rr. 5, 6, 11; Dan. Ch. Pr. 4th Ed. 886, 887.

(2) *Maclaren v. Stainton*, 16 Beav. 279, 290; 22 L. J. (Ch.) 274.

(3) *Harbottle v. Pooley*, 20 L. T. (N. S.) 436.

(4) *Ib.*

(5) *Holden v. Waterlow*, 15 W. R. 139.

(6) *Byron (Lord) v. Johnston*, 2 Mer. 29.

(7) *Et vide* p. 1261, *ante*, pl. 7.

injunction is as follows: "Upon motion by counsel for the plaintiff, [and (*if moved ex parte, before the defendant has appeared*) upon reading the Record and Writ Clerk's certificate of the filing of the bill, and the affidavits, &c., in support] (*or if the defendant has appeared, omitting the above between brackets*), the plaintiff by his counsel undertaking to abide by any order the Court may make as to damages, in case the Court should thereafter be of opinion that the defendant shall have sustained any, by reason of the order, which the plaintiff ought to pay, and (*if so*) also undertaking to accept short notice of motion to dissolve the injunction thereby awarded: This Court doth order that an injunction be awarded to restrain the defendant A., his servants, workmen, and agents, from committing (*the act enjoined*) until the hearing of the cause, or until the further order of the Court" (1). Such other terms are also imposed as the nature of the case may require (2). Where the injunction is granted in vacation without the attendance of counsel, the undertaking as to damages is inserted in the Registrar's minute book, and signed either by the plaintiff or his solicitor (3). Where the application for an *ex parte* injunction is by a limited company, the Court will not grant the injunction, except upon the undertaking of some responsible person, to be answerable in damages (4). The undertaking is irrespective of the suit; and, therefore, though the bill is dismissed, the jurisdiction as to damages remains (5). If the plaintiff is not within the jurisdiction, the undertaking must be by some responsible person within the jurisdiction (6). A married woman must enter into the undertaking in respect of her separate estate, and so trustees, co-plaintiffs, must also enter into the undertaking (7).

(1) Seton, 3rd Ed. 867.

(2) Seton, 3rd Ed. 868-870; *Chappell v. Davidson*, 8 De G. M. & G. 1; 2 K. & J. 123; *Ingram v. Stiff*, 5 Jur. (N. S.) 947; *Tuck v. Silver*, Johns. 218; *Adamson v. Wilson*, 10 L. T. (N. S.) 24; *Wakefield v. Duke of Buccleuch*, 11 Jur. (N. S.) 523; 13 W. R. 856; and see *Whaley v. Brancker*, 10 Jur. (N. S.) 535; 12 W. R. 570, 595.

(3) Seton, 3rd Ed. 870.

(4) *Anglo - Danubian Company*

(*Limited*) v. *Rogerson*, 10 Jur. (N. S.) 87.

(5) *Newby v. Harrison*, 7 Jur. (N. S.) 981; 9 W. R. 849; 3 D. F. & J. 287 (overruling S. C. 1 J. & H. 678); and see, as to the undertaking and assessment of damages, *De Mattos v. Gibson*, 1 J. & H. 79; 7 Jur. (N. S.) 282; *Southworth v. Taylor*, 28 Beav. 616; *Bingley v. Marshall*, 11 W. R. 1018.

(6) *Hamilton v. Board*, 1 N. R. 379.

(7) *Holden v. Waterlow*, 15 W. R. 139.

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If the undertaking is by a stranger to the cause, the undertaking may be effected by signing the Registrar's book (1). But where, upon an *ex parte* injunction, it was inconvenient to obtain the signature of any director or officer of the company (no one being resident in London,) to the undertaking as to damages in the Registrar's book, according to the usual practice, the Court allowed it to be given on a separate piece of paper, and transmitted to the Registrar (2). If the equity of the plaintiff is perfectly clear, or the damage is of a vague and uncertain nature, no undertaking will be required (3). Sometimes an undertaking is also added to find a sufficient surety or security for the payment of the damages (4). And sometimes payment of the sum, in respect of which the proceedings in an action have been restrained, is ordered to be made into Court (5). It is the settled practice of the Court, upon granting an interlocutory injunction upon notice, to require the plaintiff to give an undertaking as to damages (6). An undertaking as to damages ought to be given by a plaintiff who obtains an interlocutory order for an injunction, not only when the order is made *ex parte*, but even when it is made upon hearing both sides (7). The Court, in some cases, will put the defendant upon such undertaking and terms as the case may require, as a condition for not issuing an injunction (8). And, in such a case, the Court may also add, that if default is made in complying with the order, the injunction shall issue (9).

Injunctions on
notice of
motion.

7. Upon motions there is no written statement addressed to the Court, but the notice of motion must state clearly the terms of the order which will be asked for; and where the object is to discharge an order for irregularity, it is, as a general rule, better, but not necessary, to state the ground of the application, as the omis-

(1) *Gurney v. Behrends*, 9 Hare, App. lxxxix.

(2) *Pacific Steam Navigation Company v. Gibbs*, 14 W. R. 218; 13 L. T. (N. S.) 431.

(3) *Adamson v. Wilson*, 3 N. R. 368; 10 L. T. (N. S.) 24.

(4) Seton, 3rd Ed. 868.

(5) Seton, 3rd Ed. 875, 876, 878.

(6) *Wakefield v. Buccleuch (Duke*

of), 11 Jur. (N. S.) 523; 13 W. R. 856; 12 L. T. (N. S.) 628.

(7) *The Teign Valley Railw. Co. v. Southwood*, 19 W. R. 690.

(8) *Bramwell v. Halcomb*, 3 M. & C. 737, 739.

(9) *Proprietors of Northam Bridge and Roads v. London and Southampton Railw. Co.*, 1 Railw. Cas. 653.

sion to do so, may be material upon the question of costs (1). The notice of motion for an injunction may include other objects; such as the appointment of a receiver, and the payment of money into Court. Where two separate motions were made for two objects, which might have been obtained by one motion, the Court, to mark its disapprobation of this course of proceeding, ordered that a direction should be inserted in the order, that in taxing the costs of the suit, the extra costs incurred in consequence of the two motions should be paid by the plaintiff (2). The notice of motion must name the judge before whom it is to be made (3); and if the motion is not made in a cause, it must be marked with the name of the Lord Chancellor, and one of the Vice-Chancellors, or with the name of the Master of the Rolls, in the same manner as a bill is marked (4).

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SECT. 14.

8. The Court does not deal with the same strictness and severity in the case of an injunction obtained on notice, as in the case of one obtained *ex parte*, for in the case of an injunction obtained on notice, the opposite party has the opportunity of bringing forward every circumstance favourable to his case (5). But if the respondent does not appear, and the plaintiff taking advantage of his absence, entirely misleads the Court, then the Master of the Rolls in the same case said, that the Court ought properly, to visit the party so dealing, with the consequences, though not with the same strictness as in the case of an *ex parte* injunction.

The Court does not deal with the same strictness upon injunctions on notice as on *ex parte* injunctions. But if defendant does not appear, and plaintiff misleads the Court, it ought to visit the party with the consequences, though not with the same strictness as in *ex parte* injunctions.

9. The form of an order for an injunction made upon a motion with notice is as follows: "Upon motion by counsel for the plaintiff, and upon hearing counsel for the defendant, and reading (*affidavits, &c., particularising the evidence*). This Court doth order that an injunction be awarded to restrain the defendant A., his servants, workmen, and agents from (*the particular act enjoined*) until the hearing of this cause, or until the further order of this Court" (6).

Form of an order on a motion with notice.

10. A mandatory injunction is such as, being framed in an

Mandatory injunctions.

(1) *Brown v. Robertson*, 2 Ph. 173;
Lambert v. Hill, 1 Dr. & War. 74.

(2) *Hawke v. Kemp*, 3 Beav. 288.

(3) Cons. Ord. XXXIII, r. 1.

(4) Cons. Ord. VI., rr. 1, 5, 6, 11.

(5) *Maclaren v. Stainton*, 16 Beav. 279, 290.

(6) *Seton*, 3rd Ed. 867, *et seq.*

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SECT. 14.Form of a
mandatory
injunction.

indirect form, compels the defendant to restore things to their former condition, and virtually directs the defendant to perform an act (1).

11. The following is the form of a mandatory injunction restraining the keeping of documents: "Let an injunction be awarded to restrain the defendant H. from detaining and keeping possession of the books, deeds, documents, and papers removed as mentioned in the plaintiff's affidavit, by the said defendant, or by his order, from the chambers occupied by the plaintiffs, for retaining which, no written authority has been produced by the defendant; except the five boxes not claimed by the plaintiffs; and from permitting the same or any or either of them, except the said five boxes, to remain away from the office of the plaintiffs, or from parting with the books, &c., removed by the defendant, or by his order, from the chambers occupied by the plaintiffs, or any of them, except the said five boxes, to any person or persons other than the plaintiffs" (2).

12. A motion for an injunction is often by consent turned into a motion for a decree (3), in which case, leave "by order" to set the motion down in the cause book for hearing, should be obtained, in order to save the month's delay (4). If necessary the motion will

(1) *Robinson v. Lord Byron*, 1 Bro. C. C. App. 588; *Lane v. Newdigate*, 10 Ves. 192; *Rankin v. Huskisson*, 4 Sim. 13; *Spencer v. London and Birmingham Railw. Co.*, 8 Sim. 193; 1 Railw. Cas. 159; *Great North of England, &c., Railw. Co. v. Clarence Railw. Co.*, 1 Coll. 507; *Hervey v. Smith*, 1 K. & J. 392; *Att.-Gen. v. Borough of Birmingham*, 4 K. & J. 547; see *Isenburg v. East India House Company*, 33 L. J. (Ch.) 392; 10 Jur. (N. S.) 221; *Goodale v. Goodale*, 16 Sim. 316; *Shrewsbury and Chester Railw. Co. v. Shrewsbury and Birmingham Railw. Co.*, 1 Sim. (N. S.) 410; 15 Jur. 548; *Whittaker v. Howe*, 3 Beav. 383, 389; *Ranken v. East and West India Docks Company*, 12 Beav. 298, 305; *Greatrex v. Greatrex*, 1 De G. & Sm. 692; 11 Jur. 1052; *Lumley*

v. Wagner, 1 De G. M. & G. 604; 16 Jur. 871; 5 De G. & Sm. 485; *vide Blakemore v. Glamorganshire Canal Company*, 1 My. & K. 154; *Milligan v. Mitchell*, 1 My. & K. 446; *Att.-Gen. v. Manchester and Leeds Railw. Co.*, 1 Railw. Cas. 436, 451; *Hervey v. Smith*, 1 K. & J. 389, 390, 394; *Mexborough (Earl) v. Bower*, 7 Beav. 129, 134; *Evitt v. Price*, 1 Sim. 483; *Drew. Inj.* 260-265; *Kerr, Inj.* 230.

(2) *Whittaker v. Howe*, M. R. 25 Feb. 1841, Reg. Lib. B. 336; 3 Beav. 393, n.; *Seton*, 936, 3rd Ed.: and see other instances there cited of Mandatory Injunctions.

(3) *Seton*, 3rd. Ed. 871.

(4) *Green v. Low* (No. 1), 22 Beav. 395; *Dan. Ch. Pr.* 4th Ed. 767, 1449; *Wilkinson v. Cummins*, 11 Hare, 343.

be ordered to stand over to a fixed day, and in both cases the time will be fixed for the plaintiff to file his affidavits, and for the defendant to file his affidavits in answer, and the Court will give either party liberty, when the cause is set down, to apply to expedite the hearing. The plaintiff may obtain an enlargement of the time for filing affidavits, but he may not by amendment of his bill, after the time for filing affidavits has expired, raise a new case (1). Where an injunction has been granted, the defendant may, as soon as the cause is ready for hearing, apply to have it advanced, but where the injunction has not been granted, that may not be done (2). And upon interlocutory motion for an injunction to stop the carrying on of a trade (here petroleum works), the Court, remarking that it was a strong course, refused the injunction, but directed notice of motion for a decree should forthwith be given, and advanced the hearing of the cause (3).

13. The terms of the orders pronounced by the Court upon the application for interlocutory injunctions, have varied at different periods. By cases in Cary it appears, then, to have been usual to grant injunctions on surmises, with a proviso *si ita sit* (4). The form most frequently adopted, enjoined the party "till further order" (5). In some cases the injunction has been till "appearance and further order" (6); in others, "till answer and further order" (7). The form now usually adopted is "until the hearing of the cause, or until further order" (8). In the case of a bill of discovery, the form is "until answer or further order" (9).

14. If the object of the suit is to restrain proceedings in another Court, the injunction will be awarded against the defendant, his

Terms of
orders upon
interlocutory
injunctions.

Against whom
an injunction
is awarded.

(1) *Clark v. Clark*, 13 W. R. 133.

(2) *Maunsell v. Midland Great Western (Ireland) Railw. Co.*, 1 H. & M. 152.

(3) *Att.-Gen. v. Charles*, 11 W. R. 253.

(4) *Fodringham v. Chorley*, Cary, 37.

(5) *Lane v. Newdigate*, 10 Ves. 192.

(6) *Lord Grey de Wilton v. Saxon*, 6 Ves. 106.

(7) *Potter v. Chapman*, 1 Dick. 146; *Robinson v. Lord Byron*, 2 Dick. 703; *Drury v. Molins*, 6 Ves. 328 *Tam-*

worth (Lord) v. Lord Ferrers, Ib.

419. It is stated in the report of *Robinson v. Lord Byron* in 2 Cox, 4, that the injunction was "till answer or further order;" but this is a mistake; it was "and," and not "or," Reg. Lib. 1784, B. 143; 2 Dick. 703.

(8) Seton, 3rd Ed. 867, No. 1, 870.

(9) *Senior v. Pritchard*, 16 Beav. 473; *Lovell v. Galloway*, 17 Beav. 1; *Ooddeen v. Oakley*, 2 De G. F. & J. 158.

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attorneys and agents; if it is to restrain the commission of any act, such as waste, trespass, nuisance, infringement of patent, &c., it is awarded against the defendant, his agents, servants, and workmen, and these words will be inserted in the order, although the bill or notice of motion only ask for an injunction against the defendant (1). Where the plaintiff sues on behalf of himself and others not named on the record, Lord Cottenham said that an injunction which had been granted, staying proceedings against the plaintiff, was informal in protecting absent parties (*i.e.*, the other parties not named on the record) (2).

SECT. 15. *Drawing up and Service of the Notice of, and Minutes and Order for an Injunction, and Preparation and Issuing and Service of the Writ of, and Order for, an Injunction.*

1. When the order for an injunction has been obtained, if the matter is so urgent, that the object of the injunction might be defeated, if the party were bound to wait till the order could be passed and the writ issued upon it; the practice is, especially if the order is made in vacation, when the offices are closed, either to serve the party personally with notice in writing, that the injunction has been ordered, and that it will be sealed and served as soon as it can be passed through the offices (3); or, to procure a transcript of the minutes of the order signed by the Registrar, and to serve the same personally, by delivering a copy of it, shewing at the same time, the original transcript so signed; and the above-named notice, and service of the above-named copy of the minutes, will, each of them, be sufficient to render the party enjoined, guilty of a contempt, if he act in opposition to the injunction; in such cases, however, there must be no delay in getting the order for the injunction drawn up, and issuing and serving the writ of

(1) Seton, 3rd Ed. 874, 909; see *Wellesley (Lord) v. Earl of Mornington*, 11 Beav. 180; 12 Jur. 367; Dan. Ch. Pr. 4th Ed. 1512; Kerr, Inj. 624.

(2) *Armistead v. Durham*, 11 Beav. 422, 556, 561, n.; *Lund v. Blanchard*, 4 Hare, 31.

(3) In country cases the terms of the injunction, as soon as it is granted, are frequently communicated by telegraph to an agent, and he prepares therefrom and serves the formal notice above mentioned: Dan. Ch. Pr. 4th Ed. 1513, n.

injunction (1); and so, also, if it be not intended to serve the above-mentioned notice or minutes of the order for an injunction, but to serve the order for an injunction itself, there must be no delay in drawing up the order. And in *Bateman v. Wiatt* (2) the Court, upon an *ex parte* motion in April, 1849, for instructions to the Registrar to draw up an order for an injunction which had been obtained in November, 1847, on the ground of the delay which had occurred, refused the application, and said that notice must be given to the other side.

2. The writ of injunction is prepared by the solicitor of the party (3). It must be sealed by one of the Clerks of Records and Writs, with a seal of such form and impression, as shall be approved of by the Lord Chancellor, and such writ when so sealed, will have the same force and validity as such writ had, when sealed with the great seal (4). At the same time the writ is presented for sealing, either a full or an abridged copy of the writ, written on brief paper, and called a docket, must be left; and the order awarding the injunction, or an office copy thereof, must be produced (5). The writ must be indorsed with the name and place of business of the plaintiff's solicitor, and of his agent, if any, or with the name and place of residence of the plaintiff, where he acts in person, and, in both cases, with the address for service, if any (6).

3. Unless substituted service has been ordered, which in a proper case will be done (7), the service of the order for the

(1) *Vansandau v. Rose*, 2 Jac. & W. 264; *Kingston v. Eve*, 2 V. & B. 349; *McNeill v. Garrett*, C. & P. 98; 5 Jur. 836; *Scott v. Becher*, 4 Price, 346; *Ratray v. Bishop*, 3 Madd. 220; *Chuck v. Cremer*, 2 Ph. 113; *Gooch v. Marshall*, 8 W. R. 410; Dan. Ch. Pr. 4th Ed. 1513.

(2) 11 Beav. 587; *et vide Anon.* 3 Atk. 521.

(3) Cons. Ord. III., r. 1, *et seq.*

(4) Cons. Ord. I., r. 37, Braithwaite's Pr. 228. The writ must be written on parchment in words at length, and a Chancery fee-fund stamp must be affixed thereto, Ib. Regul. to Ord. Sch. 4.

(5) Braithwaite's Pr. 228. The order,

or office copy, is usually retained by the Record and Writ Clerk; but, if desired by the solicitor, it will be returned to him, on his giving a receipt for it on the back of the docket, Ib.

(6) Cons. Ord. III., rr., 2, 5; Dan. Ch. Pr. 4th Ed. 1513; Smith, Ch. Pr. 751.

(7) *Anderson v. Lewis*, 3 Bro. C. C. 429; *Portarlington (Lord) v. Graham*, 5 Sim. 418; *Kirkman v. Honnor*, 6 Beav. 400; *Heald v. Hay*, 9 W. R. 369; *Pearce v. Crutchfield*, 14 Ves. 206; *Williams v. Johns*, 1 Mer. 303, n.; *Skegg v. Simpson*, 2 De G. & Sm. 454; *Pycroft v. Williams*, 5 W. R. 464; Morg. Ch. Ord. 472; Dan. Ch. Pr. 4th Ed. 940, 1514.

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injunction, and of the writ of injunction, must be personal, and is effected by leaving with the person served (1) a true copy of the writ (2) or order; and, at the same time, shewing him the original writ as duly issued, or the order for an injunction as duly passed and entered (3). If the plaintiff cannot succeed in serving an injunction on the defendant, and the defendant's solicitor refuses to accept service, service will be ordered on the solicitor (4).

SECT. 16. *The Injunction made at the hearing of the Cause.*

The general rule is, not to grant perpetual injunctions except at the hearing of the cause, but, by consent, they may be made on interlocutory motion. Form of a perpetual injunction.

1. The general rule of the Court is, not to grant perpetual injunctions except at the hearing of the cause (5). And the plaintiff has a right to bring his cause to a hearing for the purpose of obtaining a perpetual injunction, although he has obtained an interlocutory injunction, which has been acquiesced in by the defendant (6). But, by consent, an injunction may be made perpetual on an interlocutory motion for an injunction (7).

2. The following is an example of the form of a perpetual injunction: "Let a perpetual injunction be granted (*awarded*) against the defendants, B. and H., to stay their (*restrain them from further*) proceedings at Law in the actions of prohibition and replevin in the bill mentioned; and against the defendant P., to restrain him from disturbing any person who hath been or shall be nominated curate or chaplain of the said chapel, pursuant to the right hereby declared and established, in the possession or enjoyment of the said chapel, or officiating there" (8).

3. An injunction which has been granted upon an interlocutory motion, is superseded by the decree made at the hearing of the

(1) As to service in the case of a corporation aggregate, see *Carron Company v. Maclaren*, 5 H. L. C. 416.

(2) The copy should be a full copy, including the signature of the Record and Writ Clerk, and should be indorsed in like manner as the original; *Braithwaite's Pr.* 228.

(3) *Braithwaite's Pr.* 228, 229; *Gooch v. Marshall*, 8 W. R. 410; *Woodward v. King*, 2 Dick. 797; 2 Ch. Ca. 203; S. C.

sub. nom. Woodward v. Earl of Lincoln, 3 Sw. 626; *Ellerton v. Thirsk*, 1 Jac. & W. 376; *Vansaudau v. Rose*, 2 Jac. & W. 264; Dan. Ch. Pr. 4th Ed. 1514.

(4) *Kirkman v. Honnor*, 6 Beav. 400; see *Pearce v. Crutchfield*, 14 Ves. 206; *Pulteney v. Shelton*, 3 Ves. 147.

(5) *Day v. Snee*, 3 V. & B. 171.

(6) *Beaufort (Duke of) v. Morris*, 6 Hare, 350; 2 Ph. 683; 12 Jur. 614.

(7) *Morrell v. Pearson*, 12 Beav. 284.

(8) *Seton*, 3rd Ed. 944.

cause; and if it is intended that the injunction should remain in force and become a perpetual injunction, it must be expressly continued at the hearing of the cause (1).

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4. The form of continuing or making an injunction perpetual is as follows: "Let the injunction granted (*awarded*) in this cause to restrain the defendants, their servants, agents, or workmen, from printing, publishing, or vending a book, (*comedy, or farce,*) called &c., or any part thereof, be made perpetual" (2).

Form of continuing or making an injunction perpetual.

5. Where the injunction is made perpetual, a second writ is not usually issued, but may be, and served (3).

6. An injunction is the ultimate object of, and is grantable in many suits, such as suits for restraining the infringement of copy-right, of patent rights, and the like. A perpetual injunction is, in fact, seldom resorted to, except for the purpose of putting an end to vexatious litigation, in cases in which, without it, it would be open to the defendant to renew litigation after the case had received that sort of repeated or full decision that entitles the plaintiff to be protected against further trials of the right. Thus, if a trust estate be devised to be sold, and on a bill brought against the trustees to sell, the heir contests the will, after two trials, the Court will grant a perpetual injunction. So where there have been two ejectments to try a title under an entail, and verdicts in favour of the defendant at Law, and then two trials at Bar, and verdict for the plaintiff; or, where there have been several ejectments, and in all, verdicts for one, a perpetual injunction will be granted (4). And where there has been a verdict in favour of a will, on an issue of *devisavit vel non*, then a decree in the cause in Chancery establishing the trusts of the will, and they have, under the decree, been carried into effect; an ejectment by the devisee of the heir-at-law will be restrained by perpetual injunction (5). But a perpetual injunction will not be granted, except after some repeated, or otherwise conclusive decision of the right (6). And if the conscience of the Court is not satisfied it will grant a new trial (7).

7. Where a perpetual injunction has been granted—which is,

(1) Seton, 3rd Ed. 944.

(2) Ib.

(3) Braith. 229.

(4) See *Leighton v. Leighton*, 1 P.

Wms. 671, and the cases there cited.

(5) *Lowe v. Jolliffe*, Dick. 388.

(6) *Stace v. Mabbot*, 2 Ves. Sen.

552; *Fitton v. Macclesfield*, 1 Vern.

293. See Ridg. 191; Drew. Inj. 343.

(7) *Stace v. Mabbot*, 2 Ves. Sen.

552, 553.

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in effect, a decree—and the plaintiff dies, it is not necessary or proper, on the ground of the abatement of the suit, to revive it for the purpose of sustaining the injunction; for if it were so, a perpetual injunction would be an order for a perpetual suit; and besides, the usual order on abatement of a suit, that the plaintiff may revive or the injunction be dissolved, shews that on abatement the injunction is not, *ipso facto*, gone (1). So, on the other hand, when a defendant is in a condition to dismiss the bill for want of prosecution, the fact of an injunction having been granted until answer, and not discharged, will not render the order to dismiss irregular. For if it were so, that would be to treat the injunction as perpetual, and the Court never grants a perpetual injunction till the hearing (2).

Injunctions are continued at the hearing, either provisionally or permanently. Form of a provisional injunction.

8. Injunctions are continued at the hearing, either provisionally or permanently. They may be continued provisionally pending inquiries or accounts, which are preparatory to a final adjudication upon further consideration (3). The form, in that case, is as follows: A decree (here) for an account of all dealings and transactions. Direction for payment of the balance to the party to whom it shall appear to be due. “And let the injunction (awarded) for stay of the defendant’s proceedings at Law be in the meantime continued, and the defendant’s judgment is to stand as security for payment of what, if anything, shall appear to be coming to him on the balance of the said account” (4). Injunctions may be permanently continued or made perpetual by the decree, where the party enjoined is in possession of some instrument conferring a legal right, which it is contrary to equity that he should be permitted to exercise to the detriment of the plaintiff. Thus, where the plaintiff had given to the defendant three promissory notes for a particular purpose, on his undertaking to make no improper use of them, but afterwards the defendant put the notes in suit against the plaintiff, who thereupon filed a bill to restrain the defendant from so doing, and praying that the notes might be delivered up to be cancelled; the Court at the hearing directed that a perpetual injunction should issue, and that it should extend to restrain the indorsing and further negotiation of the notes (5). The general course of the

(1) *Askew v. Townshend*, Dick. 471.

(4) *Ib.*

(2) *Day v. Snee*, 3 V. & B. 170.

(5) *Chennell v. Churchman*, 3 Bro.

(3) *Seton*, 3rd Ed. 105, No. 3.

C. C. 16, n.; *Minshaw v. Jordan*, *Ib.*

Court, however, where a party is in possession of a security or other instrument, which it is against conscience that he should use against the defendant, is to direct it to be delivered up and cancelled. The Court will—if it is satisfied that the exercise of the jurisdiction would, under the circumstances of the case, be beneficial and conducive to the interests of justice—adopt this course where the instrument is void at law, and there would consequently be a good defence at Law (1). The practice of extending injunctions at the hearing, so as to render them perpetual, is not confined to cases in which the party is in a position to annoy the plaintiff, by proceedings which he may have a legal right to institute, but it is also applied to prevent the continuance or repetition of acts, for which the party has no legal authority (2). As in cases of waste, infringement of patent, piracy of publication (3), trade marks (4); but to support a decree for a perpetual injunction, the Court requires that there shall be nothing like a doubt in the case (5). Perpetual injunctions will also be decreed, where the same question has been frequently litigated between the parties, or where it is likely to be contested in a multiplicity of suits. This is the foundation for a bill of peace, where it is necessary to quiet the rights, after repeated ejectments; for such a proceeding, unless prevented, would become oppressive to the opposite party (6); or where there

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The practice of extending injunctions at the hearing, so as to render them perpetual, is not confined to cases in which the party is in a position to annoy the plaintiff, by proceedings which he may have a legal right to institute, but it is also applied to prevent the continuance or repetition of acts, for which the party has no legal authority.—

To support a decree for a perpetual injunction, there must be nothing like a doubt in the case.—Perpetual injunctions are also decreed, where the same question has been frequently litigated between the parties, or where it is likely to be contested in a multiplicity of suits.

17, n.; and see *lb. ed. Belt. n. (2)*; *Harrington v. Du Chattel*, 1 Bro. C. C. 124; 2 Sw. 158, n.; S. C. *sub. nom.* *Harrington v. Du Chastel*, 2 Dick. 581.

(1) *Jervis v. White*, 7 Ves. 415; *Hodgson v. Murray*, 2 Sim. 517; 3 Sim. 283; see *Williams v. Roberts*, 8 Hare, 315; *Cooper v. Joel*, 27 Beav. 313, 317; *Stackhouse v. Countess of Jersey*, 1 J. & H. 731.

(2) *Wood v. Sutcliffe*, 2 Sim. (N. S.) 166; *Imperial Gas Company v. Broadbent*, 7 H. L. C. 612; *Lowndes v. Bettie*, 33 L. J. (Ch.) 451.

(3) *Macklin v. Richardson*, Amb. 694, 696; *Manby v. Owen*, 4 Burr. 23, 29, cited 13 Ves. 502; see *Colburn v.*

Sims, 2 Hare, 543; *Kelly v. Hooper*, 1 Y. & C. Ch. 191.

(4) *Millington v. Fox*, 3 My. & Cr. 338, 351.

(5) *Whittingham v. Wooler*, 2 Sw. 428, and see *Bailey v. Taylor*, 1 Russ. & My. 73; and as to the form of an injunction where the defendant submits, see *Att.-Gen. v. Boyle*, 10 Jur. (N. S.) 309.

(6) *Leighton v. Leighton*, 1 P. Wms. 671; 1 Str. 404; 4 Bro. P. C. ed. Toml. 378; *Devonsher v. Newenham*, 2 Sch. & Lef. 199, 211; *Bath (Earl of) v. Sherwin*, 10 Mod. 1; 4 Bro. P. C. ed. Toml. 378; *Hodgson v. Duce*, 2 Jur. (N. S.) 1014; *Lowndes v. Bettie*, 10 Jur. (N. S.) 226; 12 W. R. 399.

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is one general right to be established, against a great number of persons, as, the rights of a lord of a manor against his tenants, for encroachments, or the right of the tenants against the lord for disturbance; for, as the difficulties would be insuperable if each of the parties should attempt to determine their particular rights by separate and distinct actions, the Court will put the whole in peace, by a perpetual injunction (1). An injunction will be granted at the hearing of the cause, whenever it is necessary for the purposes of complete justice (2); and that, although it is not prayed by the bill (3); and although there should not have been previously an interlocutory application for an injunction (4). And a plaintiff is at liberty then to claim an injunction, although he may have previously failed to obtain one, or to support it when obtained (5).

A plaintiff is at liberty to claim an injunction at the hearing of the cause, although he may have previously failed to obtain one, or to support it when obtained.

9. Where, in a suit for an injunction to restrain the construction of a jetty by the defendant, a motion by the plaintiff for an injunction was ordered to stand over till the hearing of the cause, but no direction was given as to the costs of the motion; and at the hearing of the cause a decree for a perpetual injunction was made, according to the prayer of the bill, and it was ordered that the defendant should pay the plaintiff's costs of the suit, but the costs of the motion were not mentioned, and under these circumstances the Taxing Master refused to allow the plaintiff's costs of the motion; Lords Justices James and Mellish held (affirming a decision of Vice-Chancellor Sir R. Malins), that the motion was substantially a successful motion, and that consequently, according to the ordi-

(1) *Tenham (Lord) v. Herbert*, 2 Atk. 483; *York (Mayor of) v. Pilkington*, 1 Atk. 282; *Conyers v. Lord Abergavenny*, Ib. 285.

(2) *Dickenson v. Grand Junction Canal Company*, 15 Beav. 260.

(3) *Blomfield v. Eyre*, 8 Beav. 259; *Reynell v. Sprye*, 1 De G. M. & G. 660; vide p. 1263, ante pl. 12, (but see the observations of Vice-Chancellor Sir J. Stuart, in his judgment in *Russell v. London, Chatham, and Dover Railw. Co.*, 4 Giff. 405, 406).

(4) *Bacon v. Jones*, 4 My. & Cr. 433; S. C. sub nom. *Bacon v. Spottiswoode*, 1 Beav. 382, 384; 3 Jur. 476; *Rodgers*

v. Nowill, 6 Hare, 325, 329; *Cuddon v. Morley*, 7 Hare, 202, 205; *Dickenson v. Grand Junction Canal Company*, 15 Beav. 260; *Davies v. Marshall*, 1 Dr. & Sm. 557, 560; 7 Jur. (N. S.) 720, 722. As to the effect of laches or acquiescence, see *Att.-Gen. v. Luton Board of Health*, 2 Jur. (N. S.) 180, 182; *Patching v. Dubbins*, Kay, 1, 9; *Johnson v. Wyatt*, 2 De G. J. & S. 18; 9 Jur. (N. S.) 1833.

(5) *Bailey v. Taylor*, 1 Russ. & My. 73; *Drew. Inj.* 342-344; *Kerr, Inj.* 636, 637; *Dan. Ch. Pr.* 4th Ed. 1518-1521.

nary rule, the plaintiff's costs of it ought to have been allowed as costs in the cause. And it was also held, that it was not necessary for the plaintiff to make a special application to the Court, to have these costs allowed (1). After the motion for an injunction had been ordered to stand over till the hearing, the plaintiff amended his bill, and turned it into an information and bill, thereby claiming an injunction in support of a public right, as well as of his own private right. It was held, that this amendment did not affect the plaintiff's right to have his costs of the motion, inasmuch as the suit was, so far as he was concerned, really the same suit as it was when the motion was made (2).

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SECT. 17. *Appeals.*

1. In a Court of Law, a writ of error in a civil action, Lord Eldon says, almost generally stays all proceedings, upon the ground that the record almost is, in theory, supposed to be in the Superior Court, brought there by the Chief Justice for the purpose of being referred to (3); but it has been settled by the highest authority—that of the House of Lords—that an appeal from a Court of Equity to that House, does not stay execution of the decree (4); however, it is consistent with that regulation, that a special application may be made either to the House of Lords or to the Court below; but Lord Chancellor Eldon said, that it was much more expedient that the application should, if it could, be made to the House, than to the Court below, as the order made upon that occasion might be the subject of appeal, and it was difficult to determine how far appeals might go (5). It has accordingly become usual for applications, under various circumstances, to be made to stay proceedings pending an appeal (6); these, however, are not in general

An appeal does not during its pendency stay execution of, or proceedings under, the decree, but a special application must be made for that purpose.

(1) *Att.-Gen. v. Earl of Lonsdale*, *Mounsey v. Earl of Lonsdale*, L. R. 10 Eq. 557; 19 W. R. 235; L. R. 6 Ch. 141; 40 L. J. (Ch.) 198; 18 W. R. 1035; 23 L. T. (N. S.) 796.

(2) *Ib.*

(3) *Huguenin v. Baseley*, 15 Ves. 180, 182.

(4) Order of the House of Lords, 12 Aug., 1807; 15 Ves. 184.

(5) *Huguenin v. Baseley*, 15 Ves. 182.

(6) *Gwyn v. Lethbridge*, 14 Ves. 585; *Huguenin v. Baseley*, 15 Ves. 182; *Willan v. Willan*, 16 Ves. 89; *Waldo v. Cayley*, *Ib.* 206; *Monkhouse v. Corporation of Bedford*, 17 Ves. 381; *Way v. Foy*, 18 Ves. 452; *Macnaghten v. Boehm*, 1 Jac. & W. 48.

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If a bill seeking an injunction is dismissed at the hearing, the jurisdiction of the Court is gone; if plaintiff intends to appeal to the House of Lords, he should apply to have the order dismissing the bill so framed, as to maintain the jurisdiction pending the appeal.

favoured, and it has been said, that execution will be suffered to proceed, unless the Court sees, that if it should turn out to be wrong, the party cannot be set right again (1). And it is said, in Eden (2), that it was settled by the then most recent determinations that this motion ought to be made to the Superior Court. In *Galloway v. Mayor, &c. of London* (3) it was held, that where a bill seeking an injunction has been dismissed at the hearing, the jurisdiction of the Court is gone, and that no order can be made to bind the parties, pending an appeal to the House of Lords; and that if the plaintiff intends to appeal to that House, he should apply to have the order dismissing the bill so framed, as to maintain the jurisdiction of the Court pending the appeal; and the Lords Justices refused a motion for an injunction to restrain the defendants from summoning a jury, &c., pending an appeal. Where in a suit, the whole object of which was to restrain the alleged improper use of a trade name, a decree for a perpetual injunction had been made at the hearing, and the defendant having appealed, applied to have the hearing of the appeal advanced; the Court held, that as the right to an injunction was involved, and irreparable injury might result to the defendant, the hearing might be advanced (4). Where the business of a solicitor had been carried on by a succession of firms, in a particular house for thirty years, and eventually, the plaintiff and defendant, who were the last continuing partners, dissolved partnership, and the plaintiff filed a bill against the defendant and obtained a decree, which he immediately enrolled, declaring that the defendant had no interest in the house, and restraining him from entering it; and the defendant, being about to appeal to the House of Lords against the decree, moved to suspend the injunction pending the appeal; Lords Justices Wood and Selwyn held (reversing a decision of Vice-Chancellor Sir J. Stuart), that the case was one in which irreparable injury might be done to the defendant; and the defendant undertaking to proceed with the appeal with due diligence, and to abide by any order as to damages which the Court might make, the Court suspended the injunction

(1) *Monkhouse v. Corporation of Bedford*, 17 Ves. 382; Eden, Inj. 318.

(2) Inj. 319.

(3) 3 De G. J. & S. 59; 11 Jur. (N. S.) 537; 13 W. R. 933.

(4) *Lazenby v. White*, L. R. 6 Ch. 89; 19 W. R. 291.

pending the appeal (1); Lord Justice Sir W. P. Wood said: "The usual course is to stay proceedings pending an appeal, only when the proceedings would cause irreparable injury to the appellant. Mere inconvenience and annoyance is not enough to induce the Court, to take away from the successful party, the benefit of his decree." Where in a suit to restrain an action at Law, an *ad interim* injunction had been granted upon terms, and at the hearing the bill was dismissed; and the defendant applied for and obtained an order, that the plaintiff should give a consent for judgment in the action at Law; and the plaintiff subsequently moved, that the proceedings on that order might be stayed pending an appeal, which he undertook to present and prosecute without delay; it was held, that the application was properly made to the Vice-Chancellor, and the motion was granted (2).

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The usual course is to stay proceedings pending an appeal, only when the proceedings would cause irreparable injury; mere inconvenience and annoyance is not enough.

2. If the allegations which constitute the equity of the bill are falsified by affidavits on the other side, or if the Court shall be of opinion, that the injunction was improperly granted, it will, upon appeal, discharge the order for an injunction (3).

3. The question whether there has been a misrepresentation or concealment of material facts upon the application for an *ex parte* injunction, cannot be taken into consideration, on appeal from an order made by the Court, in which the injunction was granted, or by which it was continued (4).

4. An appeal from an order overruling a demurrer will generally be advanced, if the right to an injunction is involved, but there is no rule that it should be advanced, in other cases (5).

An appeal from an order overruling a demurrer, will generally be advanced, where the right to an injunction is involved.

SECT. 18. *Breach of Injunction.*

1. An injunction operates from the date of the order being made, and not from the time of the sealing of the writ, or even from the time of its being drawn up (6); and where an injunction had been

An injunction operates from the date of the order being made.

(1) *Walford v. Walford*, L. R. 3 Ch. 812; 19 L. T. (N. S.) 233; 16 W. R. 1161.

(2) *Hewat v. Nolan*, Ir. R. 4 Eq. 405.

(3) *Sanxter v. Foster*, Cr. & Ph. 302.

(4) *Bell v. Hull and Selby Railw.*

Co., 1 Railw. Cas. 616.

(5) *London, Chatham, and Dover Railw. Co. v. Imperial Mercantile Credit Association*, L. R. 3 Ch. 231.

(6) *Rathray v. Bishop*, 3 Madd. 220;

Osborne v. Tennant, 14 Ves. 136;

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A party who has notice of an order, is bound by it, from the time it is pronounced.

The presence of defendant's counsel in Court without instructions, when an

obtained to restrain waste, and before the order was drawn up, notice of its having been obtained, and its purport, had been served on the defendant, the morning after it was obtained, and a full explanation of its effect given verbally at the same time, but the defendant had since cut down timber, &c., he was held guilty of a breach of the injunction; and the Lord Chancellor, Lord Eldon, said, that if in this case the warrant of committal were sent to him, he thought he should not hesitate to sign it, provided there had been no delay in getting the order drawn up, sealed, and served (1). And in *M'Neill v. Garratt* (2) Lord Chancellor Tottenham said: that it was the established rule of the Court, that a party who has notice of an order is bound by it from the time it is pronounced, and if he presumed to disobey it, he was liable to the censure of the Court for so doing; and, after stating that the writ bore date when the order was passed, said: "if, therefore, the proposition then stated, namely, that a motion to commit a party for breach of an injunction could not be made without producing the writ, were correct, a party would have all the interval between the making and the passing of the order, to commit the act which the injunction was intended to restrain; and refused a motion to discharge a defendant in custody, for breach committed, after he had received notice of the order for an injunction, but before it was drawn up, with costs. The presence of a defendant's counsel in Court without instructions, when an

James v. Downes, 18 Ves. 522. Where a Court of Equity has issued an order for an injunction restraining a party from bringing an action, a Court of Common Law will enforce such order by staying proceedings under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, s. 226), although no writ of injunction has been actually issued: *Cobbett v. Ludlam*, 11 Ex. 446; 25 L. J. (Ex.) 25. But it will not stay an action on the ground that there is a suit in Equity pending, in which the same demand comes in question (even although the demand is for a debt, as to which and other demands,

the plaintiff at Law has, in Equity, consented to a decree for an account), where the Court of Equity has not stayed the action by injunction; the Court of Common Law having no jurisdiction to stay proceedings on such a ground, and the provision in the 15 & 16 Vict. c. 76, s. 226, only applying where the Court of Equity has stayed the action by injunction: *Pearse v. Robins*, 26 L. J. (Ex.) 183.

(1) *Vansandau v. Rose*, 2 Jac. & W. 264; *Kimpton v. Eve*, 2 Ves. & B. 149; *Gooch v. Marshall*, 8 W. R. 410.

(2) Cr. & Ph. 99.

interim injunction is continued against him in the absence of, and without notice to, his solicitor, does not constitute such notice to the defendant as will justify committal for contempt for a subsequent breach of the order (1). But where such an injunction has been granted, it ought, in the absence of unnecessary delay, to be obeyed, until the motion is substantially disposed of upon the merits (2).

2. An injunction, however erroneously granted or irregularly obtained, is an order of Court, and must be obeyed (3); if, therefore, the defendant or his attorney is guilty of a breach of the injunction, it is a contempt which the Court will punish (4). The order must be discharged before it can be disobeyed (5). In *Harding v. Tingey* (6) Vice-Chancellor Sir R. T. Kindersley, after observing that an application to commit for violation of an order of the Court for an injunction, was a matter *strictissimi juris*, said, it was of the greatest importance, that either an order for an injunction, or an *interim* order, should be implicitly observed, and every diligence exercised to observe it; and that where the party served with notice of such order did an act, which, unless prevented, would result in that which would create a violation of the order, he was bound to exercise the greatest diligence to prevent such result; but that the parties here, did not do what they could, and that being bound to act strictly, there would in fact have been a violation. A party affected by the order irregularly obtained, cannot disregard it, or disobey it, or treat it as a nullity, until it is discharged on a proper application (7). However, where the defendant and his solicitors had been guilty of a breach of an injunction which was irregular, Lord Eldon refused to commit them, but ordered them to pay the costs occasioned by the breach, and

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interim injunction is continued against him, is not notice to the defendant.

An injunction, however erroneously granted or irregularly obtained, must be obeyed; the order must be discharged before it can be disobeyed. An application to commit for violation of an order for an injunction, is a matter *strictissimi juris*. An order for an injunction or *interim* order, must be implicitly and diligently observed.

(1) *Carrow v. Ferrior*, 37 L. J. (Ch.) 569.

(2) *Ib.*

(3) *Woodward v. King*, 2 Ch. Ca. 203; *Woodward v. Lincoln* (*Earl of*), 3 Sw. 626; *Downshire (Marquis of) v. Lady Sandys*, 6 Ves. 109; *Partington v. Booth*, 3 Mer. 149.

(4) *Eden*, Inj. 75.

(5) *Robinson v. Lord Byron*, 2 Dick. 703; *Woodward v. King*, *lb.* 797; S. C. *sub. nom.* *Woodward v. Lincoln*

(*Earl of*), 3 Sw. 626.

(6) 12 W. R. 685; *Spokes v. Banbury Board of Health*, L. R. 1 Eq. 42.

(7) *Woodward v. Lincoln* (*Earl of*), 3 Sw. 626; S. C. *sub. nom.* *Woodward v. King*, 2 Dick. 797; *Fennings v. Humphrey*, 4 Beav. 1; *Blake v. Blake*, 7 Beav. 514; *Chuck v. Cremer*, 2 Ph. 113; *South Staffordshire Railw. Co. v. Hall*, 16 Jur. 93; *Russell v. East Anglian Railw. Co.*, 3 Mac. & G. 104; *Robinson v. Lord Byron*, 2 Dick. 703.

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Orders (here for an injunction) must be obeyed to the letter.

Form of notice of motion to discharge for irregularity, an order granting an injunction.

An undertaking with the Court, will have the effect of an injunction so far, that

If defendant or his attorney is present when the order is pronounced, a violation of the order is a breach; so, if the defendant purposely gets away before the order is pronounced.

of the motion to commit (1). In *Spokes v. Banbury Board of Health* (2) Vice-Chancellor Sir W. P. Wood said, that an order (in this case for an injunction) must be obeyed, and that those who wish to get rid of that order, must do so by the proper course, and that so long as it existed, the order must be obeyed, and obeyed to the letter, and that any one who did not obey it to the letter, was guilty of committing a wilful breach of it, unless there were some misapprehension, which all mankind were subject to, and which might mislead him, upon the plain reading of the order. Where there is an irregularity, the proper course is to move at once, upon notice, that the order may be discharged for irregularity (3). The form of a notice of motion to discharge for irregularity, an order granting an injunction is, after the formal parts, "that the order dated the —— day of —— 18—, made in this cause on the application of the plaintiff, whereby it was ordered that (*state what*) may be discharged for irregularity, with costs to be paid by the plaintiff to the said defendant" (4).

3. An undertaking entered into with the Court, is equivalent to and will have the effect of an injunction so far, that any infringement thereof may be made the subject of an application to the Court (5). and an infringement may be made the subject of an application.

4. To be guilty of a breach of injunction, the party must have notice of it; but although strictly, service or notice of the writ or order should be made by the plaintiff, yet if the defendant, or his attorney, is present when the order is pronounced (6) it is a breach of the injunction, afterwards to take the plaintiff in execution. Or if the defendant, or the defendant and his attorney, by being in Court at the hearing of the motion, is or are apprised that there is an order, he or they cannot, standing in Court until the moment the Lord Chancellor is about to pronounce the order, which, from all that passed, he or they must know will be pronounced, avoid

(1) *Partington v. Booth*, 3 Mer. 148; *Drewry v. Thacker*, 3 Sw. 546.

(2) L. R. 1 Eq. 42, 48; *Russell v. East Anglian Railw. Co.*, 3 Mac. & G. 104.

(3) *Robinson v. Lord Byron*, 2 Dick. 703.

(4) Dan. Ch. Pr. 3rd vol. Nos. 53, 1679.

(5) *London and Birmingham Railw. Co. v. Grand Junction Canal Company*, 1 Railw. Cas. 224; *Att.-Gen. v. Manchester and Leeds Railw. Co.*, 1b. 436; *Lawford v. Spicer*, 2 Jur. (N. S.) 564; *Att.-Gen. v. Boyle*, 10 Jur. (N. S.) 309.

(6) *Anon.* 3 Atk. 567; *Skip v. Harwood*, 1b. 564; *Scott v. Becher*, 4 Price, 346; *Powell v. Follett*, Dick. 116.

its consequences by getting out of the Hall before the order is actually pronounced (1).

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5. In *Kimpton v. Eve* (2), it was held that it is a breach of an injunction, to proceed to sale after personal service of a notice that an injunction against selling had been granted, where the party so proceeding, admits that he believed the order to have been made. Lord Chancellor Eldon said that the party admitting that he believed the order was made, the principle was the same as if his belief was formed from information short of actual service. And it is not necessary to constitute a breach of the injunction, that the injunction should be actually served (3).

6. If a party has, by himself or his attorney, notice in any other way of the fact of an injunction having been granted, though it should not be regular notice, it is a breach of the injunction to disobey it (4). But where the plaintiff had been guilty of four months' delay in getting the order drawn up and served, Lord Chancellor Eldon refused with costs, a motion to commit the defendant for a breach, although there was a contempt, the defendant being present at the hearing of the motion (5).

If a party has by himself or his attorney, notice of an injunction, though not a regular notice, it is a breach to disobey; but there must be no delay in drawing up the order.

7. In *Woodward v. Lincoln (Earl of)* (6), Lord Nottingham held that service of a copy of the writ and shewing the original, without allowing an examination of the original, is good service.

8. A man may be guilty of a breach of an injunction, by aiding and abetting those who are committing an act inconsistent with it, although he should not actually take part in such act. Thus where the contest was between a College at Oxford and the poor people in the neighbourhood, as to the right of cutting wood in a certain wood, and an injunction had been granted to restrain A., his servants and workmen, from cutting the wood, it was held a breach of the injunction in A. to be present and acting as leader, when a great number of the poor people drove away the servants of the plaintiff—the College—and cut wood, although A. did not actually assist, but used words of counsel to the people, dissuading

A man may commit a breach of an injunction, by aiding and abetting those committing an act inconsistent with it, although not actually taking part in such act.

(1) *Osborne v. Tennant*, 14 Ves. 136; *dan v. Rose*, 2 Jac. & W. 264.
Skip v. Harwood, 3 Atk. 564.

(2) 2 V. & B. 349, 351.

(3) *Ib.*

(4) *Lawes v. Morgan*, 5 Price, 518;
Powell v. Follett, Dick. 116; *Vansan-*

(5) *James v. Downes*, 18 Ves. 522;
Bateman v. Wiatt, 11 Beav. 587.

(6) 3 Sw. 626; 2 Ch. Ca. 203; 2
Dick. 797.

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them from using violence ; the ground being, that remaining and acting as leader, and not actually interfering to prevent the acts complained of, he was, in the opinion of the Court, inferentially aiding and assisting them (1). But where the *consistoire*, or governing body of the French Protestant Church of London, was, in 1860, restrained by injunction, from interfering with the plaintiff, a pastor of the church, in the discharge of his duties as pastor ; and, in 1866, M., a defendant in the suit, and also a pastor of the church, was present at a meeting of the *consistoire*, when they resolved to suspend the plaintiff from the discharge of his duties, and M., as agent of the *consistoire*, took an active part in enforcing, though he did not in passing, that resolution ; and the plaintiff then moved for an order to commit M. for contempt of Court, on the ground of the alleged infraction by him of the injunction granted in 1860 ; and the members of the *consistoire* were not served with, and did not appear upon, the motion ; the Court held, that it would not, in their absence, decide upon the validity or invalidity of the act of suspension, and that upon the whole case stated in support of the motion, it must be refused ; the only order to be made being that the plaintiff must pay the costs of it (2). And there may be a contempt committed even by assisting in the official act of a person acting under lawful authority ; thus in *Woodward v. Lincoln (Earl of)* (3) it was held, that a breach of an injunction to quiet possession had been committed, where the party enjoined, had assisted a justice of the peace in making restitution, upon a forcible entry.

There may be a contempt, by assisting in the official act of a person acting under lawful authority.

9. It is no breach of an injunction for a person not a party to the suit, and who has not acquired a right *pendente lite* from anyone as a party, to exercise a right which he had antecedently to the suit (4). Nor is it a breach of an injunction *staying execution*, with leave to proceed to judgment, if the defendant takes out a *scire facias quare executio non*, because that is only proceeding to judgment (5). In an old case (6) where an injunction had been

(1) *St. John's College v. Carter*, 8 L. J. 218 ; 4 My. & Cr. 497 ; S. C. sub. nom. *St. John's College v. Platt*, 3 Jur. 187.

(3) 3 Sw. 626.

(2) *Daugars v. Rivaz*, 14 L. T. (N. S.) 348 ; 15 L. T. (N. S.) 196.

(4) *Bootle v. Stanley*, 2 Eq. Ca. Ab. 528 ; *et vide Iveson v. Harris*, 7 Ves. 256.

(5) *Hankey v. Morris*, 2 Eq. Ca. Ab. 528.

(6) *Sedgwick v. Redman*, Cary, 44.

granted against the attorney of the defendant, to restrain him from proceeding at Law, it was held a breach of the injunction for the defendant to proceed.

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10. Persons not named in the order or writ of injunction, are not liable to be committed for the breach of an injunction. Thus, where an injunction restrained only A. B., but did not extend to his "servants and agents," the Court declined to commit an agent of A. B., for breach of the injunction, inasmuch as he was not expressly enjoined (1). So, also, an injunction restraining a defendant, his servants and agents, does not extend to his tenants (2); but the agents of a man against whom an injunction has been awarded, will be committed for contempt in intermeddling and doing acts in violation of the order, if, having knowledge of the injunction, they act in contravention of the injunction (3). If no blame can be attached to a man personally, he having no notice of the injunction (here against "defendants, servants, agents, and workmen") at the time, the Court will not commit him for a contempt or breach, where his servants have been guilty of a breach and contempt of the Court, in disobeying the order after notice thereof; but he is liable to the costs of the motion to commit (4).

Persons not named in the order, are not liable to be committed for a breach.

But the agents of a man against whom an injunction has been awarded, will be committed for contempt in intermeddling and doing acts in violation of the order, if, having knowledge of the injunction, they act in contravention of it.

11. An injunction only protects the plaintiffs named in the record, but if those named in the record, can procure other parties equally interested with themselves, to submit to the same terms as the plaintiffs, on the record, submit to, the Court will, on a special interlocutory application, give them the same relief or protection, as it gives to the plaintiffs on the record; but it would be competent to the defendants to shew special circumstances, which would make it unjust so to extend the injunction (5). It is open to a defendant, when he is charged with having committed a breach of an injunction (in this case to restrain an infringement of a patent), to shew that he has complied with it so long as it was in force, but that the order carried on its face, the period of its duration, and that,

(1) *Wellesley (Lord) v. Lord Morn-ington*, 11 Beav. 180; 12 Jur. 367; see *Montague v. Hill*, 4 Russ. 128.

(2) *Hodson v. Coppard*, 29 Beav. 4; 9 W. R. 9; 30 L. J. (Ch.) 20.

(3) *Wellesley (Lord) v. Lord Morn-ington*, 11 Beav. 181; see *Powell v.*

Follett, Dick. 116; *Lewes v. Morgan*, 5 Price, 518.

(4) *Rantzen v. Rothschild*, 14 W. R. 96; 13 L. T. (N. S.) 399.

(5) *Lund v. Blanshard*, 4 Hare, 290; vide S. C. p. 987, ante.

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as that period had expired, there was no order which he could be guilty of infringing (1).

12. Where an injunction has been obtained before the declaration in the action at Law has been delivered, the injunction stays *all* proceedings; it is, therefore, a breach of the injunction, to deliver a declaration (2). It is also a breach, after an injunction staying trial, to give notice of trial (3). It is a breach, after an injunction to stay trial, to obtain a judge's order for changing the venue (4). And it is a breach of an injunction restraining execution, if the defendant in Equity, the money in dispute having paid been into the Court of Law by the defendant at Law, proceeds, after verdict, to obtain a rule *nisi* to shew cause, why the money should not be paid out to him, for that is a step towards execution (5). And after an injunction has been granted, staying execution, the taking of any step towards execution, beyond the completion of the judgment, is a breach of the injunction (6). If a motion to commit for breach of an injunction for commencing an action, has been refused by the Court below, and then, pending a motion in the nature of an appeal motion, the plaintiff pleads to the action, that is not a waiver of his right to move to commit, before the superior Court (7). Where an award has been a rule of a Court of Law, that has been held a commencement of the proceeding at Law; therefore an injunction obtained afterwards, only stays execution of it; and it is no breach of the injunction, to obtain a rule to shew cause, why an attachment should not issue for non-performance of the award (8). Where an injunction had been obtained by the defendant at Law against a plaintiff at Law, it was a breach of the injunction if he gave notice of declaration at Law against the bail of the defendant at Law, after the order had been made, and although before it was served (9); but it was not a wilful breach,

(1) *Daw v. Eley*, L. R. 3 Eq. 496.

(2) *Anon.* 2 Eq. Ca. Abr. 529; *Mills v. Cobby*, 1 Mer. 3; see 3 P. Wms. 147.

(3) *Bird v. Brancher*, 2 S. & S. 186.

(4) *Pariente v. Bensusan*, 13 Sim. 522.

(5) *Brooks v. Parton*, 1 Y. & Coll. Ch. C. 271.

(6) *Bullen v. Ovey*, 16 Ves. 141;

Franklyn v. Thomas, 3 Mer. 225;

Burbidge v. Robinson, 14 Jur. 473; see *Marsack v. Bailey*, 2 S. & S. 577;

Hankey v. Morris, 2 Eq. Ca. Ab. 528.

(7) *Newman v. Ring*, 10 Jur. 463.

(8) *Franco v. Franco*, 2 Cox, 420.

(9) *Leonard v. Attwell*, 17 Ves. 385; *Chaplin v. Cooper*, 1 V. & B. 19; *Bullen v. Ovey*, 16 Ves. 141.

and therefore not to be punished by commitment, but the attorney of the plaintiff at Law would be ordered to pay the costs. But where there were proceedings against the obligor of a bond and his surety, and the principal obligor filed his bill without making the surety a party, and obtained an injunction, it was held not a breach of the injunction, to issue a *capias* against the plaintiff and the surety, on the ground that instructions were given to the sheriff's officer only to take the surety; for although, in point of form, issuing the writ was a proceeding against the plaintiff as well as the surety, *substantially* it was only a proceeding against the party against whom there was no injunction (1). And where the obligor of a bond filed his bill for an injunction to restrain the obligee, assignee, and others from proceeding at Law upon the bond, and an injunction to restrain proceedings at Law had been obtained, but issued only against the obligee, his counsellors, and agents, and did not name the assignee, Lord Chancellor Lyndhurst said it admitted of considerable doubt, whether, notwithstanding the injunction, the assignee might not have continued his action, for as assignee, he had a right to bring it, and that it was not (here) brought with the privity of the obligee (2). If an injunction has been granted against three plaintiffs at Law, and dissolved only as against two, it is a contempt of Court for the three afterwards to go on with the action; but if the injunction has, upon the application of two out of the three, been erroneously and irregularly dissolved against the three generally, and not as against two only, it is not a contempt for the two to proceed in the name of the three (3). The assignee of a *chose in action*, is not guilty of a breach of injunction, by taking proceedings at Law after the dissolution of the injunction against himself, though the injunction has not been dissolved, as against the assignor (4). In *Axe v. Clarke* (5) it was held that if the sheriff has levied under a judgment and execution, and after that the defendant at Law obtains an injunction, it is a breach of that injunction to attach the sheriff and receive the money; but Lord Chancellor Thurlow said it would

(1) *Chaplin v. Cooper*, 1 V. & B. 16(2) *Montague v. Hill*, 4 Russ. 128.(3) *Money v. Jordan*, 13 Beav. 229.(4) *Imperial Gaslight Company v.**Clarke*, You. 584.(5) *Dick*. 549.

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be different if the sheriff had paid it voluntarily ; however, Lord Chancellor Eldon, in *Franklyn v. Thomas* (1), says it is difficult to say how the act of the sheriff can vary the right of the parties, and that he thought, in such a case, the person receiving the money would be ordered to pay it into Court. And if an injunction is obtained on a bill filed after execution executed, the goods not yet being out of the hands of the sheriff, and the sheriff proceeds to sell without process, he will be ordered to pay the money into Court (2), and this without making him a party to the cause (3). Where legal process had been put into the sheriff's hands before the issuing of an injunction, and after the issuing of the injunction, the plaintiff at Law, being applied to by the sheriff for further instructions, did not stop the process, it was held, that refusing to countermand the writ, was an actual continuance of the order previously given by the plaintiff at Law to the sheriff, and was a contempt (4) ; however the Court, though holding it a contempt, would not make an order of committal, but ordered the plaintiff at Law to pay the costs of the motion, and to lose the benefit of any proclamation made subsequently to the service of the notice of motion to commit. It is a breach of an injunction staying proceedings at Law, to lodge with the sheriff an attachment for non-payment of costs, although such costs may have been actually taxed before the issuing of the injunction, and though the Court should see, that if the circumstances of the case had been fully explained to it at the time when the injunction was granted, it would not have been allowed to extend so far as it did ; as the case then stood, the injunction, however erroneously granted, was an order of the Court, and must be obeyed ; however, his Lordship made no order as to commitment, but ordered the defendants and their solicitors to pay the costs occasioned by the breach, and of the motion for committal (5).

13. If a creditor proceeds at Law against an executor, after notice of a decree against the latter to account, or after a decree in an administration suit, it is so far a contempt of Court, that

(1) 3 Mer. 234.

(3) *Ib.*(2) *Franklyn v. Thomas*, 3 Mer. 234.(4) *Woodley v. Boddington*, 9 Sim. 214.(5) *Partington v. Booth*, 3 Mer. 148.

upon a motion for an injunction to restrain further proceedings at Law, the Court will refuse the creditor the costs of the further proceedings at Law, and the costs of the application (1). This is, in another form, the rule, that on a motion in a creditor's suit to restrain the creditor, he will have his costs at Law until notice of the decree in Equity, but not further; and the costs of the motion will depend upon whether he had then notice of the decree (2).

14. If a plaintiff who has obtained an injunction, misrepresents to the public what has been done by the Court, and the defendant, to correct that misrepresentation, does an act which in strictness is a breach of the injunction, the Court will not entertain any complaint against him, on the part of the plaintiff, for such a breach (3).

Pending litigation, the Court will restrain the publication by any of the parties to the suit, of *ex parte* garbled accounts, calculated to prejudice the case of their opponents, of any of the proceedings in Court, or before the Examiner; and the circumstance that such publication is by way of defence, and in answer to similar publications by the other side, although it may excuse the party sought to be restrained, from the costs of the motion for that purpose, will not prevent the Court from granting the injunction (4). The publication of attacks on the plaintiff or defendant, or their witnesses, or the sending threatening letters by the plaintiff or defendant, addressed to the other of them, pending a suit, is a contempt of Court which will be punished by committal (5); and privilege of Parliament is no protection (6). It is a contempt of Court, as calculated to disturb the free course of justice, to publish in a newspaper after the affidavits in a cause have been filed, but before the hearing, attacks on the plaintiff and his witnesses, representing the proceedings as vexatious, and that the witnesses had been guilty of perjury,

Pending litigation, the Court will restrain publication by the parties, of garbled accounts of the proceedings, calculated to prejudice the case of their opponents.

It is a contempt to publish, after affidavits have been filed, but before the hearing, attacks on plaintiff and his witnesses.

(1) *Curre v. Bowyer*, 3 Mad. 456.

(2) *Drew. Inj.* 404.

(3) *Barfield v. Nicholson*, 2 L. J. (Ch.) 90; 2 S. & S. 1.

(4) *Coleman v. West Hartlepool Railw. Co.*, 8 W. R. 734.

(5) Cons. Ord. XLII., r. 2; *Anon.* 2 Ves. Sen. 520; *Van v. Price*, 1 Dick. 91; *Williams v. Johns*, 2 Dick. 477; 1 Mer. 303, n. (d); *Elliott v. Halmarack*, 1 Mer. 302; *Anon.* 2 Atk. 469; *Lechmere-Charl-*

ton's Case, 2 My. & Cr. 316; *Wellesley's Case*, 2 Russ. & My. 639; *Felkin v. Lord Herbert*, 10 Jur. (N.S.) 62; 12 W. R. 241; *Littler v. Thompson*, 2 Beav. 129; *Ex parte Van Sandau*, 1 Ph. 455; *Birch v. Walsh*, 10 Ir. Eq. 93; *Smith v. Lakeman*, 26 L. J. (Ch.) 305; 2 Jur. (N.S.) 1202; *Brook v. Evans*, 6 Jur. (N.S.) 1026.

(6) *Wellesley's Case and Lechmere-Charlton's Case*, *supra*.

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or holding up to ignominy, or attributing falsehood to the party or his witnesses (1); and in order to purge his contempt, the publisher must express his regret and contrition to the Court, but is not obliged to apologise to the persons to whom the falsehood was attributed (2). Although the Court will punish as a contempt, the publication by the plaintiff or defendant or other persons, of notices or advertisements with reference to the subject of a suit, calculated to prejudice the rights or misrepresent the relative positions or character of any of the parties to the cause, yet the Court will admit any error in such notices or advertisements, to be corrected by other advertisements, and will not commit the party (3).

15. An order for commitment will not be sustained, unless it can be shewn that there has been a breach of the injunction or the order (4). If the injunction be in general terms, restraining a defendant from permitting a certain injurious effect to be produced by a given cause (but not restraining any definite act), the Court must be satisfied that the injury complained of was produced by the cause assigned (5). The general terms of an injunction, will not be restricted by reference to the particular nature of the injury complained of, if it has been in spirit as well as terms violated (6).

16. Where a party claiming the legal estate, had obtained an injunction against parties claiming to be equitable mortgagees, restraining them from pulling down, destroying, or damaging houses, and committing injury to the premises, the Court held that no breach of the injunction had been committed, by the defendants obtaining an entry into one of the houses by breaking a window and the lock of one of the doors, and ejecting the plaintiff's workmen, the plaintiffs having excluded the defendants by shutting the doors and windows (7). Where an injunction had been granted restraining the stopping of vessels, it was held that bringing actions

(1) *Little v. Thompson*, 2 B. & A. 129; *Felkin v. Herbert*, 10 Jur. (N. S.) 62.

(2) *Felkin v. Herbert*, 10 Jur. (N. S.) 62.

(3) *Matthews v. Smith*, 3 Hare, 331; *Brooke v. Evans*, 6 Jur. (N. S.) 1025.

(4) *Mann v. Stephens*, 15 Sim. 377; *Dawson v. Paver*, 5 Hare, 424.

(5) *Dawson v. Paver*, 5 Hare, 524.

(6) *Att.-Gen. v. Great Northern Railw. Co.*, 4 De G. & Sm. 75; 14 Jur. 684; 15 Jur. 387.

(7) *Loder v. Arnold*, 15 Jur. 117.

against the canal company, and warning their servants that they were trespassing, was not a breach (1).

17. Although an injunction obtained before any proceedings at Law are commenced, stays all proceedings at Law, and a delivery of a declaration is a breach, yet the party entitled to that advantage, may lose it by laches. Thus, where an injunction to restrain proceedings at Law, issued on the 21st of February, and declaration in ejectment was served on the 19th of May following, and the plaintiff in Equity appeared and pleaded to the action, and took other defensive steps, and suffered notice of trial to be given, and never gave notice to the plaintiff at Law, that he was in contempt, till the 19th of July, three days before the opening of the commission, when the solicitor for the defendant, being apprized by the plaintiff's solicitor that the defendant was in contempt, immediately countermanded his notice; Lord Chancellor Eldon refused to make any order on a motion made, or to commit the defendant for contempt, and gave no costs on either side (2). The Lord Chancellor said that this was not the case of a wilful violation of the orders of the Court, and that although in such a case no act of the parties could amount to a waiver of the contempt incurred, yet in the present case it must be considered that the plaintiff had by his acquiescence dispensed with the ordinary process. In *Rodgers v. Nowill* (3) Lord Justice Turner said, that on the question of acquiescence, he thought that in a case of this description, where there had been an injunction granted by this Court, there must, in order to deprive the party who had obtained the injunction of the right to move for committal upon the breach of it, be a case made out almost amounting to such a license to the party enjoined to do the act enjoined against, as would entitle him to file a bill against others for doing that act; and said that the party enjoined must, he thought, shew such an acquiescence as would be sufficient to create a new right in him. And a breach of an injunction restraining the use of a trade mark having taken place, the Court held, that unless the defendant could shew

(1) *Grand Junction Canal Company v. Dimes*, 17 Sim. 38; 18 L. J. (Ch.) 419; 13 Jur. 779.

(2) *Mills v. Cobby*, 1 Mer. 3.

(3) 3 De G. M. & G. 614.

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must be
obeyed.

satisfactorily that he intended to use, and unless he undertook to use, a particular mark, which would not interfere with the plaintiff's mark, there must be an order for his committal (1).

18. An injunction, however erroneously granted, is an order of the Court, and must be obeyed (2). If, therefore, the defendant or his attorney is guilty of a breach of the injunction, it is a contempt of the Court, which the Court will punish by committal to prison, or, if the breach is not wilful or contemptuous, the Court is generally satisfied by merely making the party pay the costs (3); or if the breach is through mistake, the party will not be committed, but will have to pay the costs of the application bringing that breach under the notice of the Court (4). So if the breach of the injunction or order, was the result rather of an error in judgment than of a wilful contempt, the Court will not direct a commitment, but will merely order the party to pay the costs incurred by the breach of the injunction or order, and of the application (5).

19. The order for committal is obtained upon motion, and generally, notice of the motion must have been duly served personally upon the party who has committed the contempt (6). The terms of the notice of motion should be that the party "may stand committed" to Whitecross Street prison for breach of the injunction (7). Where an injunction is to do a particular thing, and the party neglects or refuses, the course to compel him, is to move that he shall do it by a particular day or stand committed (8). And, as it is against the course of the Court, to make an order affecting the liberty of the subject except on a motion day, the motion to commit can only be made on a motion day (9). Where the injunction operates by way of restraint, as where an injunction had been

(1) *Rodgers v. Nowill*, 3 De G. M. & G. 614.

(2) *Woodward v. King*, 2 Ch. Ca. 203; *Downshire (Marquis of) v. Sandys*, 6 Ves. 109; *Partington v. Booth*, 3 Mer. 149.

(3) *Woodward v. King*, 2 Ch. Ca. 203; *Downshire (Marquis of) v. Sandys*, 6 Ves. 109; *Leonard v. Attwell*, 17 Ves. 385; *Bullen v. Ovey*, 16 Ves. 141; *Partington v. Booth*, 3 Mer. 149.

(4) *Newman v. Ring*, 10 Jur. 463;

15 L. J. (N. S.) Ch. 365.

(5) *Bullen v. Ovey*, 16 Ves. 141, 144; *Leonard v. Attwell*, 17 Ves. 385, 386; *Drewry v. Thacker*, 3 Sw. 546; *Partington v. Booth*, 3 Mer. 148; *Rantzen v. Rothschild*, 14 W. R. 96.

(6) *Angerstein v. Hunt*, 6 Ves. 488.

(7) Dan. Ch. Pr. 4th Ed. 1523.

(8) *Durant v. Moore*, 2 Russ. & My. 33.

(9) *Saxby v. Saxby*, 7 Sim. 140.

granted to restrain a party from ploughing up a rabbit warren further than was necessary for the sustenance of the rabbits, a motion that the defendant shall shew cause why he should not stand committed for breach of the injunction is irregular; the proper course is, either to move that the defendant be committed for breach of the injunction; or the plaintiff may move *ex parte* that the defendant be committed unless he shew cause at a future day against it (1). An *ex parte* order for immediate committal is not irregular, and that, although the person guilty of the contempt is not a party in the cause (2). The following is the form of a notice of motion for committal for breach of an injunction: "In Chancery [*Title of the cause or matter*]: Take notice that this Honourable Court will be moved before [the Lord High Chancellor, *or* their Lordships the Lords Justices; *or* His Lordship the Master of the Rolls, *or* His Honour the Vice-Chancellor Sir A. B.] on the — day of — instant [*or* next], or so soon thereafter as counsel can be heard, by Mr. — of counsel on the part of the plaintiff, that the defendant A. B. may stand committed to Whitecross Street prison, for breach of the injunction granted pursuant to the order dated the — day of — 18—; [*or, if the writ is not served, say*] awarded to the plaintiff by the order dated the — day of — 18— to restrain the said defendant from" (*state what*); or (*if so*) "for breach of the undertaking given by the said defendant on, &c.; and that the said defendant may be ordered to pay the costs of this motion." The following is the form of a notice of motion for an order *nisi* to commit (the formal parts as in the preceding form): "To move on behalf of the plaintiff for an order *nisi* that the defendant A. B. may stand committed to Whitecross Street prison for breach of the injunction granted pursuant to the order dated the — day of — 18—; [*or, if the writ is not served, say*] awarded to the plaintiff by the order dated the — day of — 18—, to restrain the said defendant from" (*state what*); or (*if so*) for breach of the undertaking given by the said defendant on, &c." (3). If a person who was not named in the writ or order, commits acts in violation of the writ or order, the notice of motion must be, that he may be com-

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Form of notice of motion for committal for breach of injunction, and for breach of an undertaking.

Form of order *nisi* to commit.

(1) *Durant v. Moore*, 2 Russ. & My. 33; *Blanchard v. Cawthorne*, 6 Sim. 155; *Drewry, Inj.* 406.

(2) *Ex parte Clarke*, 1 Russ. & My. 563.

(3) *Dan. Ch. Pr.* vol. iii. Nos. 1681, 2.

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Form of a
motion for
substituted
service of a
notice of
motion, or
order *nisi*.

mitted for his contempt in knowingly assisting in the breach (1). Whether it be an order *nisi*, or a notice of motion for an absolute committal, the service must be personal, unless an order for substituted service is obtained. Thus, where the defendant has absconded, an order may be obtained on an *ex parte* motion, that service on his solicitor, or at his last place of abode, or at the last place of abode of the defendant's wife, shall be deemed good service; and upon that service, under such circumstances, he may be committed (2). If there has been personal service of the notice of motion, or of a motion for an order *nisi* to commit the defendant for a breach, service on the defendant's solicitor is not necessary (3). The terms of a motion for substituted service of a notice of motion, or order *nisi*, are the following, namely: "To move on behalf of the plaintiff that service of the annexed notice of motion [or order *nisi* dated — 18—] upon [describe the proposed substitute, as thus] C. D. of (residence and addition), or C. D. and E. F., members of the firm of D. & F. of (place of business and addition), or upon either of them, may be deemed good service on the defendant A. B., [or as may be] (4).

20. An affidavit of the personal service of the notice of motion to commit, or of the order *nisi*, should be prepared and filed, and on the day named in the notice, the motion should be made for the commitment; or if an order *nisi* has been obtained and served, a motion should be made at the proper time, for shewing cause to make the order absolute, on the Registrar's certificate of no cause shewn (5).

21. The motion to commit must be supported by affidavits (6), proving the due service of the notice of motion or order *nisi* (7), that the party had notice of the injunction or restraining order, and that he has committed a breach of it (8). The affidavits in

On a motion
to commit for
breach, a

(1) *Wellesley (Lord) v. Earl of Morn- 1635.*
ington, 11 Beav. 180, 181; 12 Jur. 367.

(2) *Pulteney v. Shelton*, 5 Ves. 147;
Pearce v. Crutchfield, 14 Ves. 206; and
see *Re Boger*, 3 Jur. (N. S.) 930;
Angerstein v. Hunt, 6 Ves. 488.

(3) *Bowdler v. Bowdler*, 9 L. J.
(N. S.) Ch. 394; 4 Jur. 626.

(4) Dan. Ch. Pr., vol. iii., Nos. 1684,

(5) *Durant v. Moore*, 2 Russ. & My.
33; Dan. Ch. Pr., 4th Ed., 1523; Drew.
Inj. 407.

(6) *Saxby v. Saxby*, 7 Sim. 140.

(7) *Vansandau v. Rose*, 2 Jac. & W.
264; *Gooch v. Marshall*, 8 W. R. 410.

(8) As to the necessary evidence, see
St. John's College v. Carter, 4 My. &

support of the application must specify the particular acts constituting the breach, and a general allegation that the defendant has violated the order is not sufficient (1). Affidavits filed originally to obtain an injunction, may be used to shew that the contempt charged has been committed (2).

22. In *Ellerton v. Thirsk* (3) Lord Eldon said that the motion to commit for breach of an injunction, could not be made, without producing the writ in Court. But in *M'Neill v. Garratt* (4) Lord Cottenham held, that if a party having notice of an injunction, is guilty of a breach of it, he may be committed without the production of the writ, and although the writ may not have actually issued; and observed that he could not suppose that Lord Eldon ever laid down any such rule.

23. The breach of an injunction being in the nature of a wrong, it is no objection that the plaintiff has moved to commit one of the defendants only (5).

24. If, on the hearing of the motion to commit, the fact of a breach is disputed, a trial of the question of the fact will, if necessary, be directed (6).

25. The order for committal (7) is drawn up by the Registrar in the usual manner, and delivered by the party who has obtained it, to the messenger attending the Court, who will, thereupon, obtain the Lord Chancellor's warrant, and proceed to execute it (8). An order for committal is irregular, and will be discharged, if it does not state the affidavit of service of the restraining order or injunction, and either the affidavit of the notice of motion to commit, or the appearance of counsel for the defendant on the hearing of the motion (9); but having regard to the circumstances of the case, the order was, in this case, discharged without costs (10). An order

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general allegation of violation of order, is not sufficient; the particular acts must be specified.

If a party having notice of an injunction, is guilty of a breach, he may be committed without producing the writ, and although it may not have been actually issued.

Cr. 497, S. C. *sub. nom. St. John's College v. Pratt*, 3 Jur. 187; Dan. Ch. Pr. 4th Ed. 1523.

(1) *Morris v. Morris*, 1 Hog. 238.

(2) *Thornhill v. Thornhill*, 1 Jur. (N. S.) 73.

(3) 1 Jac. & W. 376.

(4) Cr. & P. 98; 5 Jur. 836.

(5) *Newman v. Ring*, 10 Jur. 463;

5 L. J. (Ch.) (N. S.) 365.

(6) *Agar v. Regent's Canal Company*, G. Coop. 77.

(7) Form of the order, Seton, 3rd Ed. 945, No. 1.

(8) Dan. Ch. Pr. 4th Ed. 906, 1524.

(9) *Stephens v. Workman*, 11 W. R. 503.

(10) *Ib.*

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of commitment ought, in strictness, to be prefaced by an express adjudication, and not by way of inference, that the act complained of is a contempt, and that the party had committed the act; but the absence of such adjudication, is not a ground for discharging such an order for irregularity, insufficiency, or invalidity: nor is it irregular to engraft upon an order of commitment, an order that the party committed shall pay the costs of his contempt, although the ordinary course is to confine the order merely to the commitment; but if the order extends to "charges and expenses" as well as costs, it is to that extent irregular, and, on that point, varied by striking out those words (1).

26. If there has been long delay in executing a warrant of commitment, the Court will not entertain an *ex parte* application having for its object, the enforcement of the order under which the warrant was issued. The plaintiff must get a new order on a motion to commit, or move on motion that cause may be shewn, why a new warrant should not issue (2). In this case—by reason of the provisions in 5 & 6 Vict. c. 22, relative to the custody of persons guilty of contempt of Court—a warrant of commitment for breach of an injunction issued several years previously, had become incapable of being executed; but the Court, on the ground of delay in executing the warrant, refused an *ex parte* application of the nature above mentioned (3).

27. Peers and others entitled to privilege of peerage, and members of the House of Commons (4), are not liable to be committed for a breach of an injunction or order; if such parties are guilty of a breach, or a company, or a person against whom process of contempt cannot issue, whether from his being out of the jurisdiction (5) or otherwise (6), the proper course is to move that a writ of sequestration shall issue (7); and so of a corporate body aggre-

(1) *Ex parte Van Sandau*, 1 Ph. 605.

(2) *St. John's College v. Carter*, 8 Jur. 1036.

(3) *Ib.*

(4) *Robinson v. Lord Byron*, 2 Dick. 703; *Rantzen v. Rothschild*, 14 W. R. 96; *vide Lechmere-Charlton's Case*, 2 My. & Cr. 316.

(5) *Re East of England Bank*, 2 Dr. & Sm. 284.

(6) See *Storer v. Great Western Railw. Co.*, 1 Y. & C. Ch. Ca., 180; 11 L. J. (N. S.) Ch. 67.

(7) See, as to the writ of sequestration, *Tatham v. Parker*, 1 Sm. & G. 513; 17 Jur. 929; 22 L. J. (Ch.) 903.

gate (1). The following is the form of the order for a commission of sequestration to issue: "Whereas by an order, &c., the defendants, the Manchester, &c., by their counsel, undertaking, &c. (*recital of order*), now upon motion this day made by, &c., who alleged that it appears by the affidavit of, &c., that the defendants have not complied with their said undertaking, by permitting the plaintiffs to use their said railway and conveniences connected therewith from C. to S., and upon hearing counsel for the defendants, and reading the said affidavits, and the affidavit of, &c.; and this Court being of opinion that the defendants, the Manchester, &c., have committed (been guilty of) a contempt of this Court, in not complying with their undertaking to permit the plaintiffs to use their railway and conveniences connected therewith from C. to S. in the said order, dated, &c., mentioned, doth order that a commission of sequestration do issue, directed to certain commissioners to be therein named, to sequester the personal estate, and the rents, issues, and profits of the real estates of the said defendants, the Manchester, &c., until the further order of this Court" (2). If, upon hearing the motion, the Court is of opinion that the party is guilty of a breach of injunction, it makes an order for his commitment, and he will not be discharged unless he pays the adverse party his costs (3). But if the breach is not wilful (4), or contemptuous (5), or if the defendant has endeavoured to set himself right (6), or if the defendant is blameless, the contempt having been committed by a servant employed by him (7), or if the defendant expresses regret for what he has done, the Court is generally satisfied by merely making him pay the costs of the application of bringing the breach under its notice (8).

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Form of order for a commission of sequestration, for breach of injunction by a company, &c.

If the Court is of opinion that there has been a breach, it will make an order of committal, and the party will not be discharged unless he pays the other party's costs; if the breach is not wilful, &c., or if the party expresses regret, the Court is generally satisfied by making him pay the costs of the application.

(1) *Att.-Gen. v. Great Northern Railw. Co.*, 4 De G. & Sm. 75; *Spokes v. Banbury Board of Health*, L. R. 1 Eq. 42; 14 W. R. 128; see *East India Company v. Kynaston*, 3 Bli. 153, 163.

(2) Seton, 3rd Ed. 945, No. 2.

(3) Harr. Ch. Pr.; Kerr, Inj. 645.

(4) *Leonard v. Attwell*, 17 Ves. 385; *Marsack v. Bailey*, 2 S. & S. 577.

(5) *Bullen v. Ovey*, 16 Ves. 141.

(6) *Little v. Thompson*, 2 Beav. 129.

(7) *Rantzen v. Rothschild*, 14 W. R. 96.

(8) *Partington v. Booth*, 3 Mer. 149; *Woodley v. Boddington*, 9 Sim. 214; *Harding v. Tingey*, 12 W. R. 684; *Brooks v. Purton*, 1 Y. & C. Ch. Ca. 277; *Newman v. Ring*, 10 Jur. 463; *Lawford v. Spicer*, 2 Jur. (N. S.) 564; *Lane v. Stone*, 3 Giff. 629.

1. Where A., being tenant for life of a certain property without impeachment of waste, except wilful waste in pulling down houses and buildings, or suffering the same to decay, with remainder to B., B. filed a bill against A., complaining that A. had cut down certain trees, and was intending to cut down more ; and the bill prayed for an injunction, and for an account of the proceeds of the sale of the trees already felled ; and B. administered interrogatories to A., asking for particulars as to the felling of the trees, the amount of timber in each of them, and the value thereof, and how and for what purpose the same was disposed of, and for an account of all moneys received by A., with particulars ; and A. declined to answer these interrogatories, on the ground that he claimed by virtue of his interest in the property to cut down the trees, and that the validity of his claim was the question to be determined at the hearing of the cause ; it was held, by Vice-Chancellor Sir J. Bacon, that he was bound to answer (1).

2. Where, in a suit to restrain the infringement of a patent, the defendants filed their answer, admitting for the purposes of the suit, the infringements complained of, but denying the validity of the patent, and setting forth their objections thereto ; and before either side had taken any further step in the suit, the plaintiffs moved that certain questions of fact might be tried before the Court without a jury, and be set down for hearing immediately before the hearing of the suit ; Lord Chancellor Hatherley held, reversing a decision of Vice-Chancellor Sir J. Wickens, that the Court could make an order granting the usual issues, at that stage of the suit (2).

3. Where an injunction had been granted to restrain the defendant from collecting the assets of a partnership, and he was in contempt for not answering, the Court made an order authorizing the plaintiff to collect them, the order providing an indemnity to the defendant, and that the plaintiff should bring into Court the sums received when they should amount to £50 (3).

(1) *Newry (Lord) v. Earl of Kilmorey*, 817 ; 24 L. T. (N. S.) 613 ; L. R. 6 Ch. 19 W. R. 271 ; 24 L. T. (N. S.) 15. 706.

(2) *Arnold v. Bradbury*, 19 W. R. (3) *O'Brien v. Cooke*, Ir. Rep. 5 Eq. 51.

4. Where cigars, fraudulently stamped with the plaintiffs' trade mark, had been consigned to the order of E. & Co., to be forwarded to various consignees, and E. & Co., who were innocent of the fraud, offered before bill filed to erase the trade mark; so it was held, that they were not bound to pay the plaintiffs' costs (1).

5. In *Carter v. Pinto Leite* (2), Lord Justice James said: "It is important to adhere to the rule of the Court, that where there is discovery, there must be full discovery of anything reasonably material to the plaintiffs' case at the hearing, and which may be produced without any overwhelming amount of injury to the defendant;" and further on he said, "I am inclined to go as far as any judge in limiting discovery, where I am at all satisfied that it may be injurious to the defendant, and where I am not satisfied that there is any real prospect of its being of material service to the plaintiff at the hearing. Upon that ground, I think the Vice-Chancellor's order may in this case be well varied, by not compelling the defendants to discover the names of customers, or the prices at which the goods were sold to them, or bought from anybody else. That is really a matter in their trade, and it is not one which, as it seems to me, can in any way aid the plaintiffs in establishing their title to the marks in question." This was a suit to restrain the alleged improper use, by the defendants, of the plaintiffs' trade marks, where the defendants denied the plaintiffs' right to the exclusive use of the marks in question; and it was held, by Lords Justices James and Mellish, reversing a decision of Vice-Chancellor Sir J. Wickens, that the defendants, under an order for production of documents, were not bound to disclose the names of their customers, nor the prices at which they bought or sold the goods which they exported. But it was held that they must state the names of the places to which they exported goods, the name of the writer of any letter addressed to them by a former partner of their own, and, in any case in which they admitted that they used one of the marks claimed by the plaintiffs, the other marks which they used in combination therewith.

6. There is no necessity specifically to pray for liberty to inspect premises, it being a species of discovery which the Court has

There is no necessity to pray for liberty to inspect premises.

(1) *Upmann v. Elkan*, 20 W. R. 131; L. R. 12 Eq. 140; 19 W. R. 867. (2) 20 W. R. 134; L. R. 7 Ch. 96; *sub. nom. Curver v. Pinto Leite*.

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jurisdiction to grant, if the nature of the case requires it; but where the plaintiff applied for liberty to inspect the defendant's works, to ascertain the particular products used in the manufacture of chemicals which occasioned a nuisance, the motion was refused, on the ground that proof of the nuisance could be obtained from external sources (1).

The right to an interlocutory injunction is not barred by laches, if the forbearance is owing to a reasonable hope of an accommodation, and defendant has incurred no expense or injury through the delay.

There is no rule as to the time when, or the circumstances under which, a trial of issues before a Court of Law will be directed; it is a matter for the discretion of the Court; but a strong case is required.

7. The Court will not grant an interlocutory injunction, if the plaintiff, having sufficient notice of the defendant's intention to commit the act sought to be restrained, is guilty of unreasonable delay in applying to the Court (2). But a plaintiff's right to an interlocutory injunction is not barred by laches, when he has forbore in a reasonable hope of an accommodation, and the defendant has not incurred expense or injury through the delay (3).

8. There is no inflexible rule as to the time when, or the circumstances under which, a trial of issues before a Court of Law will, upon the application of a defendant, be directed. It is a matter for the discretion of the Court. A strong case, however, will be required for the Court to adopt this course (4); an application for an issue made by the defendant in an injunction suit, after an interlocutory motion for an injunction had been heard, and after notice of motion for decree had been served, was refused with costs (5). Such an application is most properly made on the occasion of a motion for an injunction (6). If in an injunction suit, the defendant makes the application, not on the occasion of a motion for an injunction, or a motion to dissolve an injunction, but by an independent motion at any other time, and especially if it is after the disclosure of the plaintiff's evidence, the Court will require very strong proof, that the case is one which the Court itself cannot satisfactorily try (7).

9. Where a motion to commit a defendant for breach of an injunction had been refused without costs, and the defendant appealed; the Court held, that there was no rule that a motion

(1) *Barlow v. Bailey*, 18 W. R. 783; (Ch.) 765; L. R. 5 Ch. 459; 18 W. R. 22 L. T. (N. S.) 464. 682; 23 L. T. (N. S.) 170.

(2) *Salisbury v. Metropolitan Railw.* (5) Ib.

Co., 39 L. J. (Ch.) 429; 18 W. R. 484. (6) Ib.

(3) *Lee v. Haley*, 18 W. R. 181. (7) Ib.

(4) *Roskell v. Whitworth*, 39 L. J.

to commit, if refused, must be refused with costs, and that an appeal as to the costs in such case will not be entertained (1).

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10. If a plaintiff files an affidavit in support of an interlocutory motion for an injunction, and is cross-examined upon the affidavit, if he has been served with a notice to produce, on cross-examination, all documents relating to the subject-matter of the injunction, he may be ordered, at the request of a defendant, to produce any documents referred to in the affidavit, or which are material to the motion; although such defendant may not have had time to put in an answer to the bill, as directed by 15 & 16 Vict. c. 86, s. 20 (2).

11. After a decree and an injunction against husband and wife, restraining proceedings abroad, it was held, by Vice-Chancellor Sir J. Stuart, that a motion to commit the husband, for his wife's breach of the injunction, could not be sustained; that where a wife is living separate from her husband, and abroad, though she has appeared jointly with him by the same solicitor in all the proceedings in the cause, a notice of motion to commit for contempt, must be served upon her personally, and that substituted service ought not to be ordered; and that either the plaintiff or the husband may obtain an order for the wife's separate appearance; and therefore the Court refused the motion, with liberty to the plaintiff and the husband to make such application as they respectively might be advised, to obtain the separate appearance of the wife (3).

12. In answering interrogatories filed by a defendant for the examination of the plaintiff, the general rule applies, that he who is bound to answer must answer fully (4). Interrogatories for the examination of a plaintiff, are on a different footing from those for the examination of a defendant, in this respect, that a plaintiff is not entitled to a discovery of the defendant's case, but a defendant may ask any questions tending to destroy the plaintiff's claim. Lord Justice Giffard said it was the defendant's business to destroy the plaintiff's

Plaintiff is not entitled to discovery of defendant's case, but defendant may ask any question tending to destroy plaintiff's case.

(1) *Hope v. Carnegie*, L. R. 4 Ch. 264; 17 W. R. 363; 20 L. T. (N. S.) 5.

(3) *Hope v. Carnegie* (1), L. R. 7 Eq. 254.

(2) *Cliff v. Bull*, 38 L. J. (Ch.) 571; 17 W. R. 1120; 20 L. T. (N. S.) 841.

(4) *Hoffmann v. Postill*, L. R. 4 Ch. 673; 20 L. T. (N. S.) 893; 17 W. R. 901.

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case, and that there the defendant had a right to ask all questions which were fairly calculated to shew that a patent was not a good patent, or that what he alleged to be an infringement was not an infringement (1). In determining whether a question is one of fact, and therefore to be answered, it makes no difference that it is asked with reference to a written document (2). In this case a defendant in a suit for infringement of a patent, in order to prove that there was no novelty in the plaintiff's patent, interrogated the plaintiff as to the inventions described in the specifications of previous patents, and asked him to shew in what respect they differed from his. The plaintiff declined to answer these interrogatories, on the ground that the questions were not questions of fact, and that they related to the plaintiff's case; the defendant excepted to the answer, and the exceptions were allowed. In the same case the plaintiff was required by interrogatories, to set out a correspondence between himself and a third party, and also to state the particulars of the infringement of his patent, on which he relied. He refused to answer these questions, on the ground that the defendant might obtain an order in Chambers to inspect the correspondence; and that he had sufficiently set out the particulars of the infringement, in his bill; the Court held, that these answers were sufficient. Questions respecting proceedings in a Foreign Court relating to infringements of the plaintiff's patent, are immaterial (3).

13. Where the plaintiffs, by the interrogatories of their bill, which was to restrain an alleged piracy, required the defendants to set forth "whether the defendants employed any and what persons, and who, by name and address, in making personal inquiries for the purpose of obtaining original information for their directory, and to place against the name of each such person the name of each town, village, and place visited by each such canvasser and agent, and the time during which he remained at each such town and village and place making personal inquiries for the purposes of the defendants' directory;" an answer that "upwards of fifty persons had been employed as canvassers, &c.," but not setting out the names and addresses of the canvassers, or the towns visited, &c., was held insufficient (4).

(1) *Hoffmann v. Postill*, L. R. 4 Ch. 673; 20 L. T. (N. S.) 893; 17 W. R. 901.

(2) *Ib.*

(3) *Ib.*

(4) *Kelly v. Wymun*, 20 L. T. (N. S.) 300.

14. In a suit for an injunction to prevent a violation of an agreement, the persons alleged to have made the agreement must be parties (1).

15. When, after a suit had been instituted in Equity, the plaintiff in Equity brought an action in respect, not only of the matter in dispute in the suit, but also of other matters foreign to the suit, the common order to elect was held not to apply, and, upon a special application, an order was made that the plaintiff should elect, and that if he should elect to proceed in Equity, he should be restrained from proceeding with so much of his action as related to the matter in question in the suit, the order as to costs being similar to that made upon making a common order (2).

16. Where upon a motion for an injunction the defendant consented to an immediate decree, but he became bankrupt before the decree had been drawn up, and his written consent to set down the cause could not be obtained, the Court made the order for setting down the cause, and dispensed with the consent (3).

17. Where a bill had been filed for an injunction to restrain the defendants from mining under the plaintiff's land, and the defendants, by their answer, denied the plaintiff's title, and the plaintiff took no steps for two years and a half to obtain an injunction; but at the end of that time, moved for an issue to be directed to try the legal right; the motion was refused, as the tardiness of the application shewed that the real object of the bill was, to try the legal title to land, contrary to 25 & 26 Vict. c. 42, s. 4 (4). The Court is not in a position to frame or direct an issue until the cause has come on for hearing (5). But an application for a special jury before the Court to try issues, or that the evidence of facts in the suit may be taken *vivâ voce* at the hearing, must be made at Chambers, and not by motion in Court (6).

18. The rule that a cross bill cannot be demurred to, for want of equity, only applies where the questions raised by the cross bill, are a part of the defence to the original suit; so far as a bill seeks

(1) *Landed Estates Investment Company v. Weeding*, 18 W. R. 35; 21 L. T. (N. S.) 384.

(2) *Kerr v. Campbell*, 17 W. R. 155.

(3) *Brighouse v. Margetson*, 35 Beav. 303.

(4) *Jenkins v. Bushby*, 16 W. R. 189.

(5) *Ib.*

(6) *Edmunds v. Brougham*, 12 Jur. (N. S.) 934; 15 W. R. 84; 15 L. T. (N. S.) 238.

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relief in respect of matters which can be of no assistance to the decision in the original suit, it is not a cross bill, and therefore not protected from demurrer (1). A bill to restrain breaches of certain portions of an agreement, cannot be taken as a cross bill to a suit instituted by the defendant, in respect of other and independent equities, arising out of the same agreement (2).

19 The dismissal of a bill to restrain breaches of an agreement, is no bar to the institution of a fresh suit for the same purpose, unless either the dismissal was for want of equity, or the facts alleged and proved in the first suit, were the same as those on which the second suit is founded (3) In this case *M.* filed a bill to restrain *C.* from trading to the Levant, contrary to the provisions of an agreement, to which *M.*, *C.*, *B.*, and others were parties, for regulating their mutual rights in the earnings of certain ships employed in the Italian trade; and the bill set out a letter from *C.*, announcing his intention to trade to the Levant, and alleged that he had since done so, in breach of the agreement; the suit was dismissed at the hearing, with costs as against *C.*, but it did not appear upon what grounds; after the time for taking evidence in *M. v. C.* was closed *C.* filed a bill against *B.* and the other parties to the agreement, praying that the accounts might be taken against *B.*, as ship's-husband, from the date and on the footing of the agreement, but praying no relief against *M.*; *M.* then filed a bill, pending an appeal in *M. v. C.*, in which the above facts were stated, and it charged that by instituting the suit of *C. v. B.*, and by other acts, *C.* had ratified and acknowledged the validity of the agreement, and it alleged fresh breaches of the agreement, and prayed that, "if necessary," it might be taken as a cross bill to *C. v. B.*, and for the same relief as was sought in *M. v. C.*; it was held, that the bill, if otherwise demurrable, could not be sustained as a cross bill; also, that it was not demurrable, as attempting to re-open what was decided in *M. v. C.*, since it was not inconsistent with the bill to suppose, that the decision in that suit, was based upon the want of proof of the alleged breaches.

20. Under the 21 & 22 Vict. c. 27, and 25 & 26 Vict. c. 42, the verdict of the judge in a trial before the Court without a jury, has

(1) *Moss v. Anglo-Egyptian Navigation Company*, L. R. 1 Ch. 108; 35 L. J. (Ch.) 179; 14 W. R. 150.
 (2) *Ib.*
 (3) *Ib.*

the same effect as the verdict of a jury, and can only be questioned upon a motion for a new trial before the judge who has tried the cause, or the Court of Appeal in Chancery (1). And where the validity of a patent had been tried before Vice-Chancellor Sir J. Stuart, without a jury, and he found for the plaintiff on all the issues, and made a decree for an injunction and accounts, which embodied the findings as its foundation, and contained no reference to the evidence, and the defendants did not apply for a new trial, but enrolled the decree, and appealed to the House of Lords; it was held, that the verdict of the Vice-Chancellor was final and conclusive, and that the decree could only be questioned on error apparent on the face of it, and consistent with the verdict remaining unchallenged (2).

21. Where, under several local and public acts, the vestry of a parish were constituted the custodians of the public ways, and were empowered to take such proceedings as they should think expedient, against any persons topping or impeding any public way, and had the soil of such ways vested in them; the Court held, that they could not sustain a suit by bill filed by them, as plaintiffs in the ordinary course, but must take proceedings by way of information, in the name of the Attorney-General (3).

22. The right to an injunction is founded on the fact, that injury is accruing to the plaintiff, and it is, therefore, necessary that that fact should be inserted in the order granting the injunction (4).

23. Where a plaintiff commenced proceedings at Law against the defendant as administratrix, for a debt due to him from the testator, and, pending the action, also instituted a creditors' suit in Chancery for the same purpose; and the defendant, before answering the plaintiff's bill, entered an appearance in the action, and obtained an order for its dismissal on payment of the debt and costs at law, and then offered terms as to the costs in Chancery, which were not accepted; on a motion by the defendant to dismiss the plaintiff's bill, the Court held, that on the payment of the costs

(1) *Fernie v. Young*, L. R. 1 H. L. 63; 12 Jur. (N.S.) 437; 35 L. J. (Ch.) 523; 14 W. R. 714; 14 L. T. (N. S.) 637.
(2) *Ib.*

(3) *Bermondsey (Vestry) v. Brown*, 14 W. R. 213; 13 L. T. (N. S.) 574.

(4) *Lingwood v. Stowmarket Paper-making Company*, 13 L. T. (N. S.) 540.
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offered by the defendant, all the proceedings in the suit were to be stayed (1).

24. Where a motion for an injunction had been refused with costs, on the ground of want of parties, the Court held, that the defendant was not entitled to the costs of affidavits bearing on the merits of the cause, which had been filed by him, but not read on the motion, the case not having been heard on the merits (2).

25. Where a plaintiff asks for an injunction, and has not, in the opinion of the Court, completely established his case, the Court may direct an issue, and will let the motion for the injunction stand over in the meantime (3).

26. Suits for an injunction to restrain waste should not be brought to a hearing where no account is sought, or the account is waived, if an injunction has been obtained, and the right to continue it is not disputed (4). If, however, the case is forced to a hearing by the conduct of the respondent, the petitioner, if successful, will be entitled to his costs of suit (5).

27. Where three out of forty-seven tenants in common filed a bill for an injunction to restrain the digging of stone on the common property, an objection for want of parties was not allowed (6).

28. Where a clear breach of an injunction has been committed by a corporate body, the Court will direct the issue of a sequestration, although it is stated and deposed to, that the real and personal property of the corporate body is vested in and held by that body under the provisions of Acts of Parliament, and were necessary for carrying out their duties under such Acts (7).

(1) *Deane v. Hamber*, 13 L. T. (N. S.) 522.

(2) *Camille v. Donato*, 11 Jur. (N. S.) 26; 13 W. R. 358; 11 L. T. (N. S.) 584.

(3) *Freeman v. Tottenham and Hampstead Railway Co.*, 11 Jur. (N. S.) 254.

(4) *Dunsany v. Dunne*, 15 Ir. Ch. Rep. 278.

(5) *Ib.*

(6) *Ackroyd v. Briggs*, 14 W. R. 25.

(7) *Spokes v. Banbury Local Board of Health*, 11 Jur. (N. S.) 1010; 14 W. R. 128; 13 L. T. (N. S.) 428; S. C. pp. 122, 744, *ante*.

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INJUNCTIONS AT COMMON LAW.

SECT. 1. *Injunctions under the Patent Law Amendment Act, 1852.*

1. By the "Patent Law Amendment Act, 1852" (15 & 16 Vict. c. 83), s. 42, it is enacted that "In any action in any of Her Majesty's superior courts of record at Westminster and in Dublin for the infringement of letters patent, it shall be lawful for the Court in which such action is pending, if the Court be then sitting, or if the Court be not sitting, then for a judge of such Court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, inspection, or account (1), and to give such direction respecting such action, injunction, inspection, and account, and the proceedings therein respectively, as to such Court or judge may seem fit." An application to inspect a defendant's machinery, may be made by a plaintiff under this section, before the delivery of the declaration in an action for infringement of the plaintiff's patent; but such inspection will not be granted as of course, or without the party applying for it, shewing an inspection to be material for the purposes of the cause (2).

2. Under sect. 82 of the Common Law Procedure Act, 1854, the Court will grant only a rule *nisi* in the first instance, for an injunction against a defendant in an action for infringing a patent, and on cause being shewn, it will give such directions as would be given by a Court of Equity, and the writ may be granted or denied, upon such terms, as to the duration of the writ, keeping an

(1) For the form of the rule or order for an account under this section, see 34 L. J. (C. P.) 130; 13 W. R. 498.
Walton v. Lavater, 8 C. B. (N. S.) 162; (2) *Amies v. Kelsey*, 22 L. J. (Q. B.) 84; see *Shaw v. Bank of England*, 22 L. J. (Ex.) 26, 210.
Elwood v. Christy, 18 C. B. (N. S.) 494;

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account, giving security or otherwise, as to the Court or a judge shall seem reasonable and just (1). The same relief may be had under the Patent Law Amendment Act, 1852, s. 42 (2).

3. The 42nd section of the 15 & 16 Vict. c. 83, enabling the Court in which any action for the infringement of a patent is pending, "to make such order for an injunction, inspection and account," as may to such Court seem fit, vests in the Courts of Common Law, the powers before exercised exclusively by Courts of Equity, and enables them to grant either, by interlocutory order, an account of all patent articles sold during the suit, or, after verdict for the plaintiff, and as part of the final judgment in the action, an account of all profits made by the defendant since the commencement of the action, and after notice that an account would be required (3). But the Court has no power, where damages, nominal or substantial, have been recovered by the plaintiff, to order an account of profits made by the defendant, prior to the commencement of the action, the damages assessed by the jury being considered as the compensation for the loss of such profits (4).

4. The inspection intended in sect. 42 (Patent Law Amendment Act, 1852), is an inspection of the instrument or machinery manufactured or used by the parties, with a view to evidence of infringement, and not an inspection of books (5).

SECT. 2. *Injunctions under the Railway and Canal Traffic Act, 1854.*

1. By "The Railway and Canal Traffic Act, 1854" (17 & 18 Vict. c. 31), after enacting (sect. 2) that "every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals, belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and

(1) *Gittins v. Symes*, 15 C. B. 362;
24 L. J. (N. S.) C. P. 48.

(2) *Ib.*

(3) *Holland v. Fox*, 3 E. & B. 977;
23 L. J. (Q. B.) 357; 1 Jur. (N. S.) 13.

(4) *Holland v. Fox*, 3 E. & B. 977;
23 L. J. (Q. B.) 357; 1 Jur. (N. S.) 13;
see *Vidi v. Smith*, 3 E. & B. 969; 1

Jur. (N. S.) 14; 24 L. J. (Q. B.) 342.

(5) *Vidi v. Smith* (*supra*).

other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable preference or disadvantage in any respect whatsoever; and every railway company, and canal company, and railway and canal company, having or working railways or canals, which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station, or wharf of the one, near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities, for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid; and so that no obstruction may be offered to the public, desirous of using such railways or canals, or railways and canals, as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf;" enacted (sect. 3) that, "It shall be lawful for any company or person complaining against any such companies or company of anything done, or of any omission made in violation or contravention of this Act, to apply in a summary way, by motion or summons, in England, to Her Majesty's Court of Common Pleas at Westminster, or in Ireland to any of Her Majesty's Superior Courts in Dublin, or in Scotland to the Court of Session in Scotland, as the case may be, or to any judge of any such Court; and, upon the certificate to Her Majesty's Attorney-General in England or Ireland, or Her Majesty's Lord Advocate in Scotland, of the Board of Trade, alleging any such violation or contravention of this Act, by any such companies or company, it shall also be lawful for the said Attorney-General or Lord Advocate to apply in like manner to any such Court or judge, and in either of such cases it shall be lawful for such Court or judge to hear and determine the matter of such complaint; and for that purpose, if such Court or judge should think fit, to direct and prosecute in such mode, and by such engineers, barristers, or

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other persons as they shall think proper, all such inquiries as may be deemed necessary to enable such Court or judge to form a just judgment on the matter of such complaint; and if it be made to appear to such Court or judge on such hearing, or on the report of any such person, that anything has been done or omission made in violation or contravention of this Act by such company or companies, it shall be lawful for such Court or judge to issue a writ of injunction or interdict, restraining such company or companies from further continuing such violation or contravention of this Act, and enjoining obedience to the same; and in case of disobedience of any such writ of injunction or interdict, it shall be lawful for such Court or judge to order that a writ or writs of attachment, or any other process of such Court incident or applicable to writs of injunction or interdict, shall issue against any one or more of the directors of any company, or against any owner, lessee, contractor, or other person failing to obey such writ of injunction or interdict; and such Court or judge may also, if they or he shall think fit, make an order directing the payment, by any one or more of such companies, of such sum of money as such Court or judge shall determine, not exceeding for each company the sum of £200 for every day, after a day to be named in the order, that such company or companies shall fail to obey such injunction or interdict; and such moneys shall be payable as the Court or judge may direct, either to the party complaining, or into Court to abide the ultimate decision of the Court, or to Her Majesty; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by decree or judgment in any superior Court at Westminster or Dublin, in England or Ireland, and in Scotland by such diligence as is competent on an extracted decree of the Court of Session; and in any such proceedings as aforesaid, such Court or judge may order and determine that all or any costs thereof or thereon incurred shall and may be paid by or to the one party or the other, as such Court or judge shall think fit" (1).

(1) As to the forms of proceedings and process under this Act to be used by parties, as prescribed by the Judges, see Reg. Gen. C. P. (H. T.), 18 Vict., 15 C. B. 473-476.

2. The 7th section of this Act (the Railway and Canal Traffic Act, 1854), (as to signed contracts, &c.), does not prevent a railway company from making a special contract as to the terms upon which the company will carry goods, provided such contract be "just and reasonable," and signed by the party sending the goods (1); and it is for the Court to say, upon the whole matters brought before them, whether or not the condition, or special contract, is just and reasonable (2). But a condition that the company will not be accountable for the loss, detention, or damage of any package insufficiently or improperly packed, was held unjust and unreasonable; though, *semble*, a condition "that no claim for damage will be allowed, unless made within three days after the delivery of the goods, nor for loss, unless made within three days of the time that they should be delivered," is just and reasonable (3). And a condition that in the case of goods conveyed at special or mileage rate the company will not be responsible for any loss or damage, however caused, is just and reasonable (4). So a condition that a railway company should not be liable for loss of market, or delay arising from detention, is a reasonable condition (5). And so upon a contract to carry cattle by rail, conditions that "the company is to be held free from all risk in respect of any damage arising in the loading or unloading, from suffocation, or from being trampled upon, bruised, or otherwise injured in transit, from fire, or from any other cause whatsoever," are reasonable (6). Where an electric telegraph company's Act provided that the public, without preference, should have the use of the company's telegraph, subject to reasonable regulations to be made by the company; and when a person wished to transmit a message by the telegraph, a message paper was handed to him for his signature, on which was endorsed a notice that messages of consequence ought to be repeated from the station to which they were addressed, and that a higher rate was charged for repeated messages,

(1) *Simons v. Great Western Railw. Co.*, 18 C. B. 805; 26 L. J. (C. P.) 25; see *Dunham v. London and North-Western Railw. Co.*, 18 C. B. 826; *Wise v. Great Western Railw. Co.*, 1 H. & N. 63; 25 L. J. (Ex.) 258.

(2) *Ib.*

(3) *Ib.*

(4) *Ib.*

(5) *White v. Great Western Railw. Co.*, 2 C. B. (N. S.) 7; 26 L. J. (C. P.) 158.

(6) *Pardington v. South Wales Railw. Co.*, 1 H. & N. 392; 2 Jur. (N. S.) 1210; 26 L. J. (Ex.) 105.

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and that the company would not be responsible for mistakes in the transmission of unrepeatd messages; the Court held, that the company was not liable for the consequences of such mistakes; and that the condition introduced into the notice was reasonable; and that if it were not a reasonable regulation under the Act, it was such a limitation of liability as the defendants in the character of common carriers were entitled to create by notice to their customers (1).

3. A carrier of passengers and goods to the station of a railway company, cannot maintain an action against the company, either at Common Law or under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), for refusing to admit him with his carriage within the precincts of the station, although the company is in the habit of admitting the public generally (2).

4. In *Caterham Railway Company, In re* (3), the Court refused to grant an injunction under this Act, on the complaint of a company having a branch on a trunk line, to restrain the parent company from charging higher rates for the conveyance of passengers to the complainant's terminus, than they charged for the conveyance of passengers to the terminus of another branch line (in which they themselves were interested), extending over the same number of miles; to constitute an undue or unreasonable preference within the Act, by reason of an inequality of charge, it must be an inequality in the charge for travelling over the same line, or the same portion of the line (4).

5. To induce the Court to interfere, on a complaint by the proprietors of a branch line, that a sufficient number of trains of the main line do not stop at the junction, nor stop at convenient times, it must be distinctly shewn, that sufficient accommodation is not afforded, to meet the fair requirements of the public (5). It is no ground of complaint, that the company working the main line, refuses to grant third class return tickets to the branch line, if it appears that no such tickets are issued in other branches similarly

(1) *M^rAndrew v. Electric Telegraph Company*, 17 C. B. 3; 1 Jur. (N. S.) 1073; 25 L. J. (C. P.) 26. 18 C. B. 46; 25 L. J. (C. P.) 184. (3) 1 C. B. (N. S.) 410; 26 L. J. (C. P.) 161.

(2) *Barker v. Midland Railw. Co.*, (4) *Ib.*

(5) *Ib.*

situate (1). But, *semble*, that it is a good ground of complaint, that there is no place of shelter provided at the junction, for passengers on the branch line waiting the arrival of trains, the public being entitled, in this respect, to reasonable accommodation (2).

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6. The granting, under an arrangement with the grantee to provide omnibus accommodation for all passengers by any of the railway company's trains to and from K., an exclusive privilege to one omnibus proprietor, of driving his vehicle into the station-yard, for the purpose of taking up and setting down passengers at the door of the booking-office, and refusing to grant the like facilities to another, who also brought passengers from K. as well as from other places beyond, was held to be a breach of the prohibition against the granting of undue and unreasonable preferences (3). But where a railway company, in consideration of £600 a year, agreed with a cab proprietor, to give him the exclusive right to have his cabs standing at their station, and plying there; the Court refused an injunction to another cab proprietor, who had been refused leave for his cabs to stand and ply there, on the ground that no inconvenience to the public, had been shewn to have arisen from the arrangement (4). And even where it was sworn, that occasional delay and inconvenience resulted to the public, from a railway company having granted exclusive right to a limited number of fly-proprietors to ply for hire within their station, the Court refused to grant a writ of injunction against the company, at the instance of a fly-proprietor, who was excluded from participation in this advantage (5).

7. To justify the interference of the Court, to enforce the running of through trains on a continuous line of railways, it must be shewn that public convenience requires it, and that it can reasonably be done. And the Court will not interfere, at the instance of an individual, where there is a continuous line by which through tickets may be obtained, though by a somewhat longer route, no additional cost, or serious loss of time, being thereby incurred, and

(1) *Caterham Railw. Co., In re*, 1 C. B. (N. S.) 410; 26 L. J. (C. P.) 161.

(2) *Ib.*

(3) *Marriott, In re*, 1 C. B. (N. S.) 499; 3 Jur. (N. S.) 493; 26 L. J. (C. P.) 154.

(4) *Beadell v. Eastern Counties Railw. Co.*, 2 C. B. 509; 26 L. J. (C. P.) 250.

(5) *Painter, Ex parte*, 3 C. B. (N. S.) 702.

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no substantial inconvenience being thereby occasioned to the public, and it appearing that no complaints had been made, of the inadequacy of the existing accommodation (1).

8. A railway is justified in carrying goods for one person, at a less rate than that at which the company carries the same description of goods for another, if there are circumstances which render the cost to the company of carrying for the former, less than the cost of carrying for the latter (2). And it is not a contravention of sect. 2 of the 17 & 18 Vict. c. 31, as giving an undue or unreasonable preference, to carry goods for one person at a lower rate than the company does for another, where it does so in consideration of a guarantie of large quantities, and full train loads at regular periods, provided the real object of the company, is to obtain thereby a greater remunerative profit, by the diminished cost of carriage, although the effect may be, to exclude from the lower rate, those persons who cannot give such guarantie (3). And a railway company may enter into special agreements, securing advantages to individuals in the carriage of goods upon the railway, where it is made clearly to appear, that in entering into such agreements, the company has only the interests of the proprietors, and the legitimate increase of the profits of the railway, in view, and the consideration given to the company, in return for the advantages afforded by it, be adequate, and the company is willing to afford the same facilities, to all others upon the same terms (4). But a railway company cannot carry from A. to B., on their main line, for one customer at a lower rate than they charge for the carriage between the same points, of goods of the same quality and quantity for other customers, without an undue preference of the one over the others, although he engages to send all his other traffic with other places, lying wide of the main line from A. to B., by the company's branch lines, distinct from and unconnected with that in respect of which the preference was given, and takes on himself the risk of the carriage between A. and B. ; and the Court

(1) *Barrett, In re*, 1 C. B. (N. S.) 423 ; 26 L. J. (C.P.) 83.

(2) *Oxlade v. North Eastern Railw. Co.*, 1 C. B. (N. S.) 454 ; 3 Jur. (N. S.) 637 ; 26 L. J. (C.P.) 129.

(3) *Nicholson v. Great Western Railw. Co.*, 4 C. B. (N. S.) 366 ; 4 Jur. (N. S.) 1187 ; 28 L. J. (C.P.) 89.

(4) *Ib.*

will restrain such a practice by injunction (1). If a railway company, for the carriage of goods for A., charge him the same sum that they charge B. for the collection, carriage, and delivery of such goods, this is an unequal charge, and an undue preference of themselves in their separate capacity of carriers, other than on the line of railway, and also an undue prejudice to A., and is a proper subject of restraint by injunction, and it makes no difference that the company is ready and willing to collect, carry, and deliver for A. also, at the same charge (2). And a railway company has no right to impose a charge, for the conveyance of goods to or from their station, where the customer does not require such service to be performed by them (3). And where a railway company had been in the habit of carrying goods between the termini of their line, according to a tariff of rates, from which they made deductions to persons who brought or took away their goods to or from the termini up to a certain day, when they put a stop to these deductions, with a view to exclude other carriers from competing with them as carriers; the Court held, that this was an undue prejudice to all such customers as did not desire to have their goods collected and delivered for them (4). The G. W. Railway Company had an office at C., for the reception of goods to be carried by them on their railway, and an agent there, to whom the goods arriving at the station addressed to persons residing in C., were intrusted for delivery on account and for the profit of the company; the complainant, a common carrier at C., complained that the company refused to recognise or act upon general orders, signed by the consignees of goods, directing the company to hand over to him (the complainant) for delivery, all goods which might arrive at the C. station addressed to such consignees; but that they required him (the complainant), to produce on each occasion, a special order describing the particular goods which the consignees desired to have delivered to them by him; no such special (or any)

(1) *Baxendale v. Great Western Railw. Co.*, 5 C. B. (N. S.) 309; 4 Jur. (N. S.) 1241; 28 L. J. (C. P.) 69. (2) *Baxendale v. Great Western Railw. Co.*, 5 C. B. (N. S.) 336; 4 Jur. (N. S.) 1279; 28 L. J. (C. P.) 81; *Garton v. Bristol and Exeter Railw.* Co., 5 Jur. (N. S.) 1313; 28 L. J. (C. P.) 306.

(3) *Garton v. Bristol and Exeter Railw. Co.*, 6 C. B. 639.

(4) *Garton v. Great Western Railw. Co.*, 5 C. B. (N. S.) 669; 5 Jur. (N. S.) 685; 28 L. J. (C. P.) 158.

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orders being required from their own agent; the Court held, that this was ground for an injunction under the Railway and Canal Traffic Act, 1854, sect. 2, it being an undue and unreasonable prejudice to the complainant, in the conduct of his business of a carrier, and an undue preference and advantage to the company themselves (1). If a company secretly engage with certain persons in the town of D., on their line, in consideration of their contracting to have all goods of a certain class consigned to them through the railway, and not by water or other means, to convey such goods to and from D. for them at lower rates than they carry for A. the same description of goods, it not being shewn that this arrangement was resorted to *bonâ fide* in order to meet competition with the railway by any other railway or mode of carriage, or that it was justified by any special circumstances of advantage to the company, or that it obtained for the company such an increase of traffic as fairly compensated for the reduced rate of charge on those persons; this is an undue preference over A. (2). Where a railway company, possessed of a line from B. to C., advertised to convey goods from A. to C. (in conjunction with another company), at the rate of 50s. per ton, provided they were consigned by A. to their own agents at those places, but if consigned through any one else, the company charged 2s. 6d. per ton more; this was held to be a ground for an injunction under the 17 & 18 Vict. c. 31 (3), and the rule was made absolute with costs, although it prayed a writ enjoining the company to charge an equal rate for the carriage from A. to C.; and the writ was granted as from B. to C. only (4). And, *semble*, both companies ought to have been brought before the Court by the rule (5). Where a railway company would not allow their servants to unload the goods of C. from their trucks, without extra charge, but unloaded the goods of P., as these, from the smallness of their quantity, were not carried, like the goods of C., in separate trucks, but were mixed with the com-

(1) *Re Parkinson v. Great Western Railw. Co.*, L. R. 6 C. P. 551; 19 W. R. 1063; 40 L. J. (C.P.) 222; 24 L. T. (N. S.) 830.

(2) *Gurton v. Bristol and Exeter Railw. Co.*, 6 C. B. (N. S.) 639; 5 Jur. (N. S.) 1313; 28 L. J. (C. P.) 306;

and see *Same v. Same*, 1 E. B. & S. 112; 7 Jur. (N. S.) 1234; 30 L. J. (Q. B.) 273; 9 W. R. 734.

(3) *Buxendale v. North Devon Railw. Co.*, 3 C. B. (N. S.) 324.

(4) *Ib.*

(5) *Ib.*

pany's own traffic, the Court refused to make absolute a rule for an injunction, enjoining the company to unload the trucks containing C.'s goods, and to deliver such goods to C., by placing the same in or adjacent to his waggons (1). Where a number of separate parcels (each weighing less than 1 cwt., but exceeding 1 cwt. if taken in the aggregate) was brought to the railway by the same person, and containing the same article, and all directed to the same person at their place of destination, the company, according to a scale framed under the powers of their Act, charged a tonnage, or lower rate; but if similar parcels were brought addressed to several different persons, they were charged the higher, or parcels rate; the Court held that there was nothing to induce the Court (or which ought to induce a jury) to infer that the charges so made were unreasonable, regard being had to the additional trouble incurred by the company (2). If a railway company, at a certain hour, previous to the starting of a certain train, shut their station, and refuse afterwards to admit the goods of the public generally, intended for that train, but admit at a later hour goods brought by B., an agent of theirs, who keeps a receiving-house for goods going by railway, and who forwards them by that train on a higher rate being paid him by consignors; this facility given to B., is an undue preference over those who did not wish to have their goods conveyed for them to the station (3). In *Baxendale and London and South Western Railway Company, In re* (4), the Court granted an injunction against a railway company under the 17 & 18 Vict. c. 31, to restrain them from requiring other carriers to bring their goods to the railway station, at an earlier hour than they received their goods, delivered at their own receiving offices. And where, by the rules of a railway company, the station gates were closed at 6:30 p.m., so that no goods could be received after that hour to be dispatched the same night, and the gates were thus closed against the vans of the complainant, a carrier, but the company's own vans, which had been to their various receiving offices, were systemati-

(1) *Cooper v. London and South Western Railw. Co.*, 4 C. B. 738; 27 L. J. (C. P.) 324. *Railw. Co.*, 6 C. B. (N. S.) 639; 5 Jur. (N. S.) 1313; 28 L. J. (C. P.) 306; and see *Same v. Same*, 1 E., B. & S.

(2) *Baxendale v. Eastern Counties Railw. Co.*, 4 C. B. (N. S.) 63. 112; 7 Jur. (N. S.) 1234; 30 L. J. (Q. B.) 273; 9 W. R. 734.

(3) *Garton v. Bristol and Exeter* (4) 12 C. B. (N. S.) 758.

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cally admitted at a later hour, and the goods they brought were forwarded the same night; the Court held, that this was giving the company's traffic an undue preference, and granted an injunction under the Railway and Canal Traffic Act. But it was *queried*, whether, if such a course of business were necessary for the convenience of the public, it would be an undue preference within the statute (1). But where a railway fixed, as a limit for receiving parcels to be forwarded the same night, the hour of 6.30 p.m., but after that time admitted their own waggons, which had been delayed in reaching the station, or in which the goods had been previously sorted, and were ready for transmission; and a carrier forwarding goods by the railway, having applied for an injunction to restrain the company from giving undue preference to themselves, the injunction was not granted; the Court being divided in opinion, Erle, C.J., and M. Smith, J., holding, that the exercise of this special jurisdiction by the Court being subject to no review, and depending in each instance on the special facts of the case, cases previously decided under it, are not binding on the Court in the same manner that precedents in Law are binding; that the injunction prayed would interfere with the transport of traffic, which it was the object of the Legislature to facilitate, and that it ought not to be granted. But Willes and Keating, JJ., held, that the cases cited (2) were precedents binding on the Court, and also that they were rightly decided, and that the injunction ought to be granted (3). Where the tariff which had been sanctioned by the Court of Common Pleas, under which a railway company were to convey coals from Peterborough into a certain district beyond Cambridge was, that when a dealer at Peterborough consigned 200 tons, or thirty-five trucks, to be carried into the district, the company would charge him at a lower rate than the ordinary one, and the custom of the company was, owing to the

(1) *Palmer v. London, Brighton, &c., Railw. Co.*, 19 W. R. 627; L. R. 6 C. P. 194; 40 L. J. (C. P.) 133; 24 L. T. (N. S.) 135; *vide Palmer, In re v. London and South Western Railw. Co., infra.*

(2) *Garton v. Bristol and Exeter Railw. Co.*, 6 C. B. (N. S.) 639; *Baren-*

dale v. South Western Railw. Co., 12 C. B. (N. S.) 758.

(3) *Palmer, In re v. London and South Western Railw. Co.*, L. R. 1 C. P. 588; 12 Jur. (N. S.) 926; 35 L. J. (C. P.) 289; 15 W. R. 11; 15 L. T. (N. S.) 159; *vide Palmer, In re, v. London, Brighton, &c., Railw. Co., supra*

steep gradients beyond Cambridge, which otherwise would have required increased steam power, to divide the train at Cambridge, and send about twenty-five trucks on, and leave the other ten to come by the ordinary goods or other trains, to which they might be advantageously attached, and none of the coals were ever left at Cambridge for consumption there, but were all carried to the district to which they had been so consigned; the Court held, upon an application for a writ of injunction for carrying a less quantity than 200 tons into the district, that by so doing the company had not given an undue preference to the consignors at Peterborough, since, the tariff being valid, it was immaterial how the company carried the coals most conveniently to themselves, provided the tariff was not infringed (1). On a motion by a coal merchant, to enjoin a company to afford him the same facilities for receiving and forwarding his coals, as to certain collieries, the coals of which were consigned to the company, the Court held that the arrangements of the company with the collieries for the requisite supply of coals, were proper, and not such as gave or caused any unreasonable preference or disadvantage, and refused an injunction (2). But where, from a desire to introduce northern coke into Staffordshire, there were agreements with certain merchants, for the carriage of coal and coke at a lower rate than their ordinary charge, there being nothing to shew that the pecuniary interests of the company were affected, the Court held that the lowering of the rate for this traffic, was giving it an undue preference (3).

9. In dealing with the first branch of the 17 & 18 Vict. c. 31, s. 2, which prohibits railway companies from giving any undue or unreasonable preference or advantage, the fair interests of the company are to be taken into the account (4).

10. Where the object of the difference of the rates for carriage, was to enable the Peterborough dealers (whose coal came to Peterborough by railway) to compete in the coal trade of the

(1) *Ransome and Others v. Eastern Counties Railw. Co.*, 8 C. B. (N. S.) 709; 8 W. R. 527; 29 L. J. (C. P.) 329; 2 L. T. (N. S.) 376; 7 Jur. (N. S.) 99.

(2) *Oxlade v. North-Eastern Railw. Co.*, 1 C. B. (N. S.) 454; 3 Jur. (N. S.)

637; 26 L. J. (C. P.) 129.

(3) *Ib.*

(4) *Ransome, In re v. Eastern Counties Railw. Co.*, 1 C. B. (N. S.) 437; 4 C. B. (N. S.) 135; 3 Jur. (N. S.) 217; 4 Jur. (N. S.) 284; 26 L. J. (C. P.) 91; 27 L. J. (C. P.) 166.

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district with the Ipswich dealers, who had the advantage of having their coals brought to Ipswich by sea, the Court held that this was giving undue preference to the Peterborough dealers, annihilating (in point of expense of carriage), in favour of the latter, a certain portion of the distance between Peterborough and those places (1). But where the railway company established certain districts, within which they carried coals at lower rates for quantities not less than 200 tons, and so adjusted these districts, that the places where the Ipswich dealers dealt, were distributed into three districts, the traffic in each of which did not allow such Ipswich dealers to send coals there in such large quantities, while for the Peterborough dealers, a single district was constituted, which comprised several of the places at which the Ipswich dealers traded, and had a traffic sufficiently large, to enable the Peterborough dealers to take advantage of the lower rates, the Court declined to interfere, it not appearing that the Ipswich dealers were unduly subjected to this disadvantage, or that it was caused by any undue preference or partiality, it being sworn, on the part of the company, that these districts were adjusted, not with a view to give an undue preference to the one set of dealers over the other, but solely with regard to their own convenience, and the wants of the neighbourhood (2).

11. It is an undue preference, for a railway company to carry coals from a colliery along the railway at a lower rate of charges, than coals from other coal pits, situate in the same locality, in consequence of a threat from the owner of the colliery to construct another railway, by which the traffic would have been diverted, if the railway company had not consented to carry at such lower rate (3).

12. A railway company is not justified in depriving any one of the natural advantages, which have been acquired by the proximity of his land to the railway, by allowing to another, not so favourably situate, the expense which the latter has incurred, in connect-

(1) *Ransome, In re v. Eastern Counties Railw. Co.*, 1 C. B. (N. S.) 437; 4 C. B. (N. S.) 135; 3 Jur. (N. S.) 217; 4 Jur. (N. S.) 284; 26 L. J. (C. P.) 91; 27 L. J. (C. P.) 166.

(2) *Ib.*
(3) *Harris v. Cockermouth and Worthington Railw. Co.*, 3 C. B. (N. S.) 693; 4 Jur. (N. S.) 239; 27 L. J. (C. P.) 162.

ing his place with the railway in the reduced charge at which they carry his goods on their railway (1).

13. Where a railway company had allotted the whole of the space available for coal wharves at one of its stations, to a coal merchant named P., at a certain rent, and P. deposited in this space coal brought there by the railway, till sold, not using more than half the space, and W., B., & Co., coal merchants, had obtained a rule *nisi*, under the Railway and Canal Traffic Act, 1854, for an injunction against the company, enjoining them to abstain from giving the wharf accommodation exclusively to P., or to allot part of the coal wharves to them, on the same terms; the Court was divided in opinion, Chief Justice Bovill and Justice Keating holding that the wharves were part of the railway within the Act, and were necessary for the coal traffic; and that by allotting the whole to P., although it was more than he required, the company had subjected other coal dealers to undue disadvantage within the Act; but Justices Montague Smith and Brett holding that the allotment to P. was not connected with the receiving, forwarding, or delivery of the coals, and that therefore the Court had no jurisdiction under the Act, in consequence of this division of opinion, the rule dropped (2).

14. There is no obligation on a railway company, whether at Common Law or under the 17 & 18 Vict. c. 31, to carry goods otherwise than according to their profession. Therefore it is competent to them, to restrict their coal traffic, to the carriage of coals for colliery owners, from the pit's mouth, to stations where such colliery owners have cells or dépôts appropriated to them, for the reception and sale of their coals, and to decline to carry coals from station to station, or for coal merchants, such an arrangement being essential to the regulation of the large traffic in that article, and the company not being common carriers of coal (3).

15. In *Jones v. Eastern Counties Railway Company* (4), the Court refused to grant a rule for an injunction against the company, to

(1) *Harris v. Cockerhmouth & Worthington Railw. Co.*, 3 C. B. (N. S.) 693; 4 Jur. (N. S.) 239; 27 L. J. (C. P.) 162. C. P. 622; 18 W. R. 1028; 39 L. J. (C. P.) 282; 23 L. T. (N. S.) 371.

(2) *West and Others v. London and North-Western Railw. Co.*, L. R. 5 (3) *Oxlade v. North-Eastern Railw. Co.*, 15 C. B. (N. S.) 680.

(4) 3 C. B. (N. S.) 318.

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compel them to issue season tickets between Colchester and London, on the same terms as they issued them between Harwich and London, upon a mere suggestion that the granting the latter (the distance being considerably greater), at a much lower rate than the former, was an undue and unreasonable preference of the inhabitants of Harwich, over those of Colchester.

16. It is an undue preference for a railway company to permit a carrier (who also acts as superintendent of their goods traffic), to hold himself out as their agent for the receipt of goods to be carried on their line, and his office as the receiving office of the company, the goods being received by him at that place, without requiring the senders to sign conditions, which the company required all other carriers, who brought goods to their stations, to sign (1).

17. The 17 & 18 Vict. c. 31, was designed to afford a remedy against an undue preference, or undue prejudice to a particular individual or class, in respect of the traffic on the railway or canal, and was not intended to apply to the case of a breach or neglect by the company of a public duty, which was already susceptible of redress, by mandamus or by indictment. And where a railway company was required by an Act of Parliament, to maintain an old dock and the approach thereto, of a given depth, the Court held, that the failure to perform this duty, so that the dock and its approach became silted up, and the depth of water therein insufficient for vessels to get to the wharves adjoining, was not a subject of redress under this statute (17 & 18 Vict. c. 31), although it was suggested, that the object of the company was to discourage the traffic to this old dock, and to divert it to another, a new one (2).

18. A special contract to carry goods, though not signed by the consignor, is binding upon a railway company, as it is not within the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), s. 7, which provides that no special contract shall be binding upon the party, unless signed by him or the person delivering the goods to be carried (3).

(1) *Baxendale, In re, and Bristol and Exeter Railw. Co.*, 11 C. B. (N. S.) 707. *and Lincolnshire Railw. Co.*, 6 C. B. (N. S.) 707.

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(3) *Baxendale v. Great Eastern Railw. Co.*, 10 B. & S. 212.

SECT. 3. *Injunctions under the Common Law Procedure Act, 1854.*PART IV.
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1. By "The Common Law Procedure Act, 1854" (17 & 18 Vict. c. 125), s. 79, it is enacted that "in all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may, in like case and manner as therein-before provided with respect to mandamus, claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract, or injury of a like kind, arising out of the same contract, or relating to the same property or right; and he may also in the same action include a claim for damages or other redress;" and by sect. 81 it is enacted that "in such action judgment may be given that the writ of injunction do or do not issue, as justice may require, and in case of such disobedience such writ of injunction may be enforced by attachment by the Court, or when such Courts shall not be sitting, by a judge;" and by sect. 82 it is enacted that "it shall be lawful for the plaintiff, at any time after the commencement of the action, and whether before or after judgment, to apply *ex parte* to the Court, or a judge, for a writ of injunction to restrain the defendant in such action, from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right, and such writ may be granted or denied by the Court or judge upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to such Court or judge shall seem reasonable and just, and in case of disobedience, such writ may be enforced by attachment by the Court, or, when such Courts shall not be sitting, by a judge: provided always, that any order for a writ of injunction made by a judge, or any writ issued by virtue thereof, may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order (1).

2. The Act only confers upon Courts of Law, a concurrent jurisdiction with Courts of Equity by way of injunction in certain cases, made concurrent with Courts of Equity.

The jurisdiction at Law is, in certain

(1) As to writs of injunction at Law, see Chitty's Arch. 1103, *et seq.*

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There is no jurisdiction against a threatened injury, but only where the wrongful act is commenced.

The injunction must be founded on a continuing contract, or an injury to property of a permanent nature.

No injunction will be granted, which would call upon defendant to do an illegal act.

cases, and does not oust the jurisdiction of Courts of Equity in such matters (1).

3. The Act does not give Courts of Law power to grant an injunction against a threatened injury, but only in cases where the wrongful act has been actually commenced. The powers, moreover, given by the Act, can be used only against the defendant or defendants in the particular action, and can only affect them, as to acts which they themselves do, or authorize to be done (2). An injunction must be founded either on a continuing contract, or an injury to property of a permanent nature (3).

4. *Semble*, that under the powers conferred by the Common Law Procedure Act, 1854, s. 82, an injunction will not be granted as a matter of course where a legal right has been invaded, but the Courts of Common Law will take the circumstances of the case into consideration (4).

5. The Court will not grant a writ of injunction under s. 82 of this Act, when by so doing, the defendant would be called upon to do an illegal act (5). And therefore where a railway company had conveyed to A., a piece of land abutting on their viaduct, with a covenant not to build within six feet of the wall of the viaduct, the Court, in an action against A.'s widow (who took by assignment) for building against the wall in breach of the covenant, in which action she had suffered judgment by default, refused to grant an injunction against her, commanding her to remove the building, it appearing that it had been erected by her under-tenant, and, consequently, that she could not obey the writ, if granted (6).

6. Upon an action brought by the plaintiffs as reversioners, for injury done to some houses by the defendants in the course of their works, where the declaration concluded with a claim for a writ of injunction, to restrain the defendants from the repetition or continuance of the injuries complained of; the Court of Exchequer

(1) *Hodgson v. Duce*, 4 W. R. 576; *Baxendale v. West Midland Railw. Co.*, 3 Giff. 650; 7 L. T. (N. S.) 297.

(2) See *Matthews v. King*, 3 II. & C. 910; 12 Jur. (N. S.) App. 335.

(3) *Sutton v. South-Eastern Railw. Co.* (*semb. per Pollock*, C.B.), 11 Jur. (N. S.) 935; 35 L. J. (Ex.) 38; 14

W. R. 133; 13 L. T. (N. S.) 438.

(4) *Jessel v. Chaplin*, 2 Jur. (N. S.) 931.

(5) *London and North-Western Railw. Co. v. Webb*, 15 C. B. (N. S.) 450; 12 W. R. 51; 9 L. T. (N. S.) 291.

(6) 1b.

held, that where a declaration, claiming a writ of injunction, does not disclose facts shewing clearly, that there could not be an injunction, the Court will refuse to allow the defendants to demur to so much of the declaration as claimed the writ (1). A claim in a declaration for an injunction in an action, cannot be met by a plea before trial; Chief Baron Pollock said his opinion was, that a claim for an injunction, was merely a preliminary matter, to enable the plaintiff subsequently to ask for one, and therefore it did not call for a plea (2).

7. Under the Common Law Procedure Act, 1854, injunctions have been obtained to restrain the obstruction of ancient lights (3); to restrain a lessor from working, in breach of a covenant for quiet enjoyment, ironstone within such a distance of the surface of the soil, as interfered with the lessee getting the coal demised, with full advantage and profit (4); to restrain the breach of an agreement not to practise as a surgeon within a certain distance of a place (5); to restrain the publication of copies of photographic portraits (6); to restrain the carrying on of works so as to be a nuisance (7).

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The Act does not extend to ejectment.

The injunction is continuing until it is got rid of by the defendant.

8. This Act does not extend to ejectment (8).

9. Where an injunction had been obtained, restraining the defendant from carrying on works so as to be a nuisance to the plaintiff, upon a motion for the costs of a rule for an attachment for a breach of it, the Court held that the injunction was a continuing injunction, and that it was not necessary to reserve to the plaintiff, leave to renew the motion for an attachment, in case of any future breach (9). Such injunction continues until it is got rid of by the defendant, even after a reference to an arbitrator (on motion for

(1) *Bilke and Others v. London, Chatham, and Dover Railw. Co.*, 3 H. & C. 950; 33 L. J. (Ex.) 206; 10 Jur. (N. S.) 777; 12 W. R. 921; 10 L. T. (N. S.) 651.

(2) *Booth v. Taylor*, 4 H. & C. 70; 11 Jur. (N. S.) 981; 14 W. R. 131; 13 L. T. (N. S.) Ex. 408.

(3) *Jessel v. Chaplin*, 2 Jur. (N. S.) 931.

(4) *Shaw v. Stenton*, 2 H. & N. 858; 27 L. J. (Ex.) 253.

(5) *Carnes v. Nisbett*, 7 H. & N. 158;

et vide Young v. Chalkley, 15 W. R. 743.

(6) *Mayall v. Higby*, 10 W. R. 631; 31 L. J. (Ex.) 329.

(7) *De la Rue v. Fortescue*, 2 H. & N. 324; 26 L. J. (Ex.) 339; *Matthews v. King*, 13 L. T. (N. S.) 120; *Grindley v. Booth*, 3 H. & C. 369.

(8) *Baylis v. Legros*, 2 C. B. (N. S.) 316; 3 Jur. (N. S.) 795; 26 L. J. (C. P.) 176.

(9) *De la Rue v. Fortescue*, 2 H. & N. 324; 26 L. J. (Ex.) 339.

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an attachment), and alterations of the defendant's works, in accordance with the arbitrator's recommendation, so as to prevent the recurrence of the nuisance. And it is competent for the plaintiff to apply at any time for an attachment, in case of disobedience to the injunction; and, *semble*, during the long vacation he may apply to a judge at chambers (1). If in such a reference, under the authority of the Court, pending a rule for an attachment, the arbitrator reports that after the injunction issued there was a continuance of the nuisance, the defendant will be liable to the costs of the rule, and the reference (the costs having been reserved by the Court for its discretion), even although in consequence of their having adopted his recommendations, the rule for an attachment is not proceeded with (2).

A plaintiff who sues for liquidated damages on the breach of an agreement, will not be allowed to join therewith a claim for an injunction.

10. A plaintiff who sues as for liquidated damages, on the breach of an agreement, will not be allowed to join therewith a claim for an injunction; so held, upon an action for £100 as liquidated damages, on an agreement not to practise as a surgeon within five miles from C. without the plaintiff's consent. Such an agreement is not void in restraint of trade, and the plaintiff is entitled to recover the £100, but not to an injunction to restrain the defendant from future practising at C. (3). And where, by a written agreement, the plaintiff engaged the defendant, as manager in his trade of a butcher, at H., in consideration of which, the defendant promised not to carry on that trade either on his own account, or on the account of any other person, within two miles of the plaintiff's shop at H. "under a penalty or forfeiture of £20;" and the defendant entered the plaintiff's service and then left it, and set up a butcher's shop just opposite the plaintiff's; and the plaintiff, who by a writ claimed an injunction, sued him for unliquidated damages, and recovered £20; the Court held, that on the construction of the agreement the £20 was the measure of damages, and that no more could be recovered, and that therefore the injunction should not go (4).

So where the sum recovered is, on the construction of an agreement, the measure of damages. There is a Common Law

11. A person lending photographic portraits to another, who,

(1) *De la Rue v. Fortescue*, 2 H. & N. 324; 26 L. J. (Ex.) 339. 811; 4 L. T. (N.S.) 558; 7 H. & N. 158; 31 L. J. (Ex.) 273.

(2) *Ib.*

(4) *Young v. Chalkley*, 15 W. R.

(3) *Carnes v. Nisbett*, 7 Jur. (N.S.) 743; 16 L. T. (N.S.) 286.
1250; 30 L. J. (Ex.) 348; 9 W. R.

with his consent, engraved and published for a particular purpose (*i.e.*, for the purpose of a newspaper), copies, can, on the ground of an infringement of a Common Law and legal right of property, *i.e.*, the exclusive right to use a man's own property, sue an assignee of the negatives and portraits in trespass for taking the portraits, claiming damages from the defendant for making, publishing, and selling reduced copies of the same without the permission of the lender, and also in detinue for the portraits and negatives, and is entitled to a writ of injunction, to restrain the defendant from continuing to make and sell such reduced and other copies (1).

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and legal right to the exclusive right of using one's own property, and a party is entitled to restrain the infringing such right by making and selling copies of photographic portraits.

12. Where the defendant had, subsequently to a verdict and judgment for the plaintiff in an action against a shareholder in a cost-book copper mining company, for a nuisance and injury to crops and cattle, by the noxious vapours arising from arsenic works connected with the mine, and before notice of the application for the injunction, *bonâ fide* disposed of his shares in the company, and had no further interest in, or control over, the works; the Court discharged a rule *nisi*, obtained after the verdict and judgment, for an injunction to restrain him from continuing the nuisance, in reference to which, the plaintiff had recovered damages (2).

13. The Court will not grant an injunction under the Common Law Procedure Act, 1854, ss. 79, 82, to restrain a railway company from charging a carrier for the carriage of his goods "otherwise than equally with all other persons, and after the same rate in respect of goods of the like description," this not being a class of cases to which sect. 79 applies, and the plaintiff having his remedy in the Court of Common Pleas and in Chancery (3).

SECT. 4. *Staying Proceedings under the Common Law Procedure Act, 1852.*

1. By the 226th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), it is enacted that, "In case any action,

(1) *Mayall v. Higby*, 1 H. & C. 148; 8 Jur. (N.S.) 622; 31 L. J. (Ex.) 329; 10 W. R. 631. (3) *Sutton v. South Eastern Railw. Co.*, L. R. 1 Ex. 32; 2 H. & C. 325; 11 Jur. (N.S.) 935; 35 L. J. (Ex.)

(2) *Matthews v. King*, 3 H. & C. 910; 13 L. T. (N.S.) 120. 38; 14 W. R. 130; 13 L. T. (N.S.) 438.

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suit, or proceeding in any Court of Law or Equity shall be commenced, sued, or prosecuted, in disobedience of, and contrary to, any writ of injunction, rule, or order of either of the Superior Courts of Law or Equity at Westminster, or of any judge thereof, in any other Court than that by or in which such injunction may have been issued, or rule or order made, upon the production to any such other Court or judge thereof of such writ of injunction, rule, or order, the said other Court (in which such action, suit, or proceeding may be commenced, prosecuted, or taken), or any judge thereof, shall stay all further proceedings contrary to any such injunction, rule, or order; and thenceforth all further and subsequent proceedings shall be utterly null and void to all intents and purposes: provided always, that nothing herein contained shall be held to diminish, alter, abridge, or vary the liability of any person or persons commencing, suing, or prosecuting any such action, suit, or proceeding contrary to any injunction, rule, or order of either of the Courts aforesaid, to any attachment, punishment, or other proceeding, to which any such person or persons are, may, or shall be liable in cases of contempt of either of the Courts aforesaid, in regard to the commencing, suing, or prosecuting such action, suit, or proceeding."

2. The Court of Admiralty having made an order, under the 17 & 18 Vict. c. 104, s. 514 (the Merchant Shipping Act, 1854), and the 24 Vict. c. 10, s. 13, "that all actions pending in any other Court in relation to the liability of the owners of the N. (which vessel, with her cargo, had been lost in a collision at sea), in respect of loss to goods be stopped;" the defendants, who were the owners of the N., moved the Court to stay an action which had been brought by the plaintiff, to recover damages for the loss of goods which the defendants had contracted to carry from L. to G.; but the Court refused the rule, on the ground that sect. 226 of the Common Law Procedure Act, 1852, only applied to the Superior Courts of Law and Equity (1).

3. An election to proceed in Equity, is no bar to proceeding for the costs of the action, and if a plaintiff proceeding both at Law and in Equity for the same subject matter, after issue joined, under

(1) *Milburn v. London and South* 19 W. R. 105; 23 L. T. (N.S.) 418; *Western Railw. Co.*, L. R. 6 Ex. 4; 10 L. J. (Ex.) 1.

an order of the Court of Equity, elect to proceed in Equity, the Court will not, under sect. 226 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), prevent the defendant from proceeding to obtain judgment in the action for his costs in pursuance of sect. 101, and he may under that section serve the plaintiff with notice to proceed in the action, and in default of his proceeding enter a suggestion and sign judgment for his costs (1).

4. Where a Court of Equity has issued an order for an injunction restraining a party from bringing an action, a Court of Common Law will enforce such order by staying proceedings under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, s. 226), although no writ of injunction has been actually issued (2). But it will not stay an action on the ground that there is a suit in Equity pending, in which the same demand comes in question (even although the demand is for a debt, as to which and other demands, the plaintiff at Law has, in Equity, consented to a decree for an account), where the Court of Equity has not stayed the action by injunction; the Court of Common Law having no jurisdiction to stay proceedings on such a ground, and the provision in the 15 & 16 Vict. c. 76, s. 226, only applying where the Court of Equity has stayed the action by injunction (3).

(1) *Mortimore v. Soares*, E. & E. 25 L. J. (Ex.) 25.
399; 5 Jur. (N. S.) 574.

(3) *Pearse v. Robins*, 26 L. J. (Ex.)

(2) *Cobbett v. Ludlam*, 11 Ex. 446; 183.

CHAPTER II.

PRACTICE ON INJUNCTIONS AT COMMON LAW.

PART IV.

Before applying for an injunction, a full representation of the grievance ought to be made to the company.

1. Before any application for an injunction against a railway company, the complainant ought to make a full representation of the grievance of which he seeks redress, to the company, and in general, it is only on the failure of such application, that he is to come to the Court (1).

2. A rule, calling on a railway company to shew cause why they should not act in compliance with the Railway Traffic Act, 1854, is too vague (2).

3. A rule under the Railway Traffic Act (1854), having been moved without mention of costs, the Court adhered to its general practice, and made it absolute without costs (3). Where a complainant asked by the rule more than he was entitled to, and the company was partially in the wrong, the Court refused to allow costs to either (4). Where a railway company has so acted, as to render it necessary and proper for any person to come to the Court for redress under the 17 & 18 Vict. c. 31, the Court will, as a general rule, make the rule absolute with costs (5). Where the plaintiff in an action for a nuisance, under sect. 82 of the Common Law Procedure Act, 1854, obtained an order for an injunction, *ex parte*, which was silent as to costs, and the writ issued to restrain the nuisance, and also, under sect. 32 of the Common Law Procedure Act, 1860, for the payment of the costs, the Court held, that the plaintiff ought not to be allowed to proceed to

(1) *Cooper v. London and South Western Railw. Co.*, 4 Jur. (N.S.) 762.

(2) *Marriott, In re v. London and South Western Railw. Co.*, 3 Jur. (N.S.) 493; 26 L. J. (C.P.) 154.

(3) *Ib.*

(4) *Oxlade v. North Eastern Railw. Co.*, 1 C. B. (N.S.) 454.

(5) *Buxendale v. London and South Western Railw. Co.*, 4 C. B. (N.S.) 159; 4 Jur. (N.S.) 859.

recover the costs of the injunction, before the trial (1). Where a judge at Chambers, refused to allow a railway company their costs of resisting an unsuccessful summons for an injunction under the Railway Traffic Act (17 & 18 Vict. c. 31), indorsing the summons thus, "in the event of a second application being made, and not succeeding, the costs of this application to be paid by the railway; otherwise, no order as to costs," the Court declined to review his decision, on the ground that the costs were in the discretion of the judge at Chambers, and that he having exercised that discretion the Court would not interfere (2).

4. An attachment against directors of a railway company for non-compliance with an injunction granted under the 17 & 18 Vict. c. 31, s. 3, will not issue, where it appears that steps have been taken by the company, with a view fairly and honestly to carry into effect the injunction, and a *bonâ fide* endeavour to conform to the order of the Court, and where apparent departures from the spirit of the order, are explained to the satisfaction of the Court, although it appeared that the reformed scale of charges for carriage of coals, still operated in some other respects injuriously to the interests of the complainants, and advantageously to the parties (3).

5. By the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126) s. 32, it is enacted, that "in all cases in which a writ of mandamus or of injunction is issued under the provisions of 'The Common Law Procedure Act, 1854,' such writ shall, unless otherwise ordered by the Court or a judge, in addition to the matter directed to be inserted therein, command the defendant to pay to the plaintiff the costs of preparing, issuing, and serving such writ, and payment of such costs may be enforced in the same manner as costs payable under a rule of Court are now by law enforceable;" and sect. 33 enacts that "writs of injunction against a corporation may be enforced either by attachment against the directors or other officers thereof, as in the case of a mandamus, or by writ of sequestration against their property and effects, to be issued in

An attachment for non-compliance with an injunction granted under the 17 & 18 Vict. c. 31, s. 3, will not issue, where it appears that steps have been taken by the company, with a view fairly and honestly to carry into effect the injunction.

(1) *Grindley v. Booth*, 34 L. J. (Ex.) Railw. Co., L. R. 4 C. P. 151.

135; 3 H. & C. 369; 11 Jur. (N. S.) 745; 12 L. T. (N. S.) 469. (3) *Ransome v. Eastern Counties Railw. Co.*, 4 C. B. (N. S.) 159; 4 Jur. (N. S.) 859.

(2) *Ilfracombe Public Conveyance Company v. London and South Western*

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(1) 11 Ir. Com. L. R. App. 23 Q. B.

THE END.

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Equity has jurisdiction over a judgment in a copyhold court, 54.

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COPYRIGHT,

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- court calendar*, copyright in a, as an individual work, protected, 292 ; and so of an *East India calendar*, 292.
- law reports*, colourable abridgment of, restrained, 292 ; no injunction against fair abridgment, 292.
- reports of legal decisions*, as to copyright, *same as any other literary work*, 297.
- it is *piracy to collect and reprint from the reports all the cases on a particular subject*, and that though collection and classification new and with unpublished decisions and notes, 297.
- matter or arrangement*, copyright may be in, but not in a *copy*, &c., 293.
- book of roads*, consisting of P.'s book with additions, &c., injunction refused to restrain an edition of P.'s book with those additions, 293.
- a man may publish a book of roads same as another's, but he cannot copy that book, 295 : See 298.
- poems*, Milton's, with N.'s notes, publication restrained, 293.
- specification of patents*, no copyright in, 295.
- general subject*, no copyright in, but an individual work must not be copied, 295.
- an abridgment fairly made* is a new book, but *books colourably shortened* are within Copyright Acts, 296, 298.
- an abstract in an annual (here) not piracy, 298.
- tables calculated by oneself*, there is copyright in, and though same tables are already published, 298.
- tales, the publication of, already published in a journal*—in a weekly supplementary number—is a publication separately within 5 & 6 Vict. c. 45, s. 18, 299.
- directory or guide book, compiler of*, must obtain his information independently—but he may verify the correctness of his own results by previous works, 299.
- compiler of new directory, for what he may or may not use slips from old one*, 302, 305.
- a newspaper is not within Copyright Act, 5 & 6 Vict. c. 45, as to registration, but proprietor can restrain piracy, 302.
- there is nothing analogous to copyright in the name of a newspaper, and registration of assignment is futile, 305 ; but proprietor has a right to prevent others adopting the name, and the right is a chattel interest assignable, 305.
- theories*, no monopoly in, 303.
- what is a *fair use of other works* of same kind, 270.
- what is a *fair use* by subsequent compiler of a prior author's work of compilation, 272.
- it is *piracy to take matter in a prior work borrowed from authorities open to all* to save labour and expense of consulting originals, 272.
- production of original MSS.* is important evidence of *bona fides*, 270.
- falsely to deny having copied* or taken any idea or language from another work is strong indication of *animus furandi*, 271.
- Court will not grudge any labour* to ascertain how far injunction should extend, 272.
- a *fraudulent intention* in infringing copyright is not necessary to entitle to relief, 280.

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publication of chapters containing the piracies, restrained, Court being unable (here) to obtain from defendant the *quantum*, 272.

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altering articles, or inserting others, Court refused here (remuneration of editor depending on success of journal) to restrain proprietors, a jury must determine the damage (if any) in such a case, 280.

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The copyright of articles written by persons employed and paid by the editor is not in the publisher employing the editor, *semble*, 296.

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an alien friend first publishing his work whilst residing in this country, or in any possession of the British Crown, is entitled to copyright, 274.

a foreigner resident abroad cannot give his assignee a title, 275.

an alien author of a serial tale first publishing abroad has copyright of last chapters published in England, if residing at the time in British territory, 276.

alien authors, the word "author" in 5 & 6 Vict. c. 45, includes, 276.

where publication is first in foreign country then in this, there is no copyright in the purchaser of the work, 277.

the International Copyright Act (7 & 8 Vict. c. 12), s. 19, applies to British subjects publishing in a country with which no international convention exists, 277.

A British subject first producing a drama at New York, but not having complied with the Act, and being no treaty, has no copyright in England, 277.

the International Copyright Acts (7 & 8 Vict. c. 12, 15 & 16 Vict. c. 12), and the Convention with France, and Order in Council, do not exempt authors in France from conditions affecting authors in England, 277.

a French weekly newspaper must be registered three months after commencement, or, if commenced before 1852, within three months after Order in Council, 278; neglect of officials to register prevents author having benefit of the statutes, *i.e.*, the International Copyright Acts, 278.

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Under 8 Anne, c. 19, property of book was not vested until registration, 298. no relief if false registration of date of publication, 300.

no copyright by registration before actual publication, 300.

the registration of a title of an intended publication does not give copyright in the title, 301.

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- in registering a work of which copyright is claimed of part only, the part need not be distinguished, 304.
- but such part should be distinguished in a bill, otherwise the unnecessary costs fall on plaintiff, 304.
- discovery*, plaintiff is entitled to a, in a suit to restrain piracy of a literary work, notwithstanding submission to injunction, 278.
- plaintiff has a right to a discovery of the sources of defendant's work, 304.
- unsold stock of copies*, no injunction against selling at end of a term of years granted for sole right of sale, 278; but a question may arise as to the proper number of copies of an edition, 279.
- unsold copies of pirated edition*, registered owner of copyright is entitled to, and to the profits on copies unsold, 281.
- unsold copies*, delivery up of, 294.
- assignment*, copyright can be assigned by a receipt in writing, and no formal assignment is necessary, *semble*, 279.
- the name of the editor of a journal on the title page is no part of the title, 280.
- covenant not to publish, &c.*, a publisher with notice of a, will be restrained breaking it, 280; and, *semble*, partner of covenantor restrained, 280.
- newspaper, daily publication restrained* of "*Daily London Journal*," in breach of covenant by covenantor, proprietor of "*London Journal*," not to publish a weekly periodical similar thereto, 281.
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- evidence required on bills to restrain infringement of copyright, 1293.
- when Court satisfied piratical imitation made, plaintiff not put on terms of bringing action to try title, 283.
- title in a case of copyright may be either legal or equitable, 1293; but persons having legal title must be a party to the bill, 1293.
- the agreement for the publication of a work (here) of a personal nature, and not assignable by either without consent of other party, 248.
- joint interest, several can have a, and copyright in a book by one of them, 286.
- "*Imitating*" book, injunction refused as to, 287.
- equitable title only, party with, can restrain piracy, 289.
- parts of work considered to be pirated, not necessary to specify in bill, &c., 290.
- conduct of plaintiff having been calculated to lead defendants to believe no objection would be made, injunction before trial refused, 293.
- lashes*, possession of a copy more than a year before filing bill, held, 290; lashes for fifteen years, 292.
- acquiescence*, if, in different individuals transcribing cases, Court will not restrain others doing so until legal right established, 291; long acquiescence is a bar to relief, 299.
- criticism, minuteness of matter extracted for*, has great weight with reference to the right to an injunction, 290.
- not only quantity, but quality of matter extracted, has to be considered on application for injunction, 291.
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where there is fair doubt whether the Law would give damages for the piracy—*ex parte* injunction not maintained—plaintiff must first establish his legal right, 299.

where evidence as to plaintiff's right was contradicted by defendant's evidence, no injunction was granted until right established at Law, 299.

the mere declaration of an intention to publish a magazine, or any manufactured article bearing a particular name or mark, cannot create a right to exclusive use of such name or mark, nor will expenditure do so, 300.

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CORPORATIONS AGGREGATE,

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club, a member of, may be expelled by a meeting, authorized by the rules, fairly called and upon a *bonâ fide* decision, and not through caprice, 751.

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where, has concurrent jurisdiction with Court of Equity—matter improperly brought into Equity, sect. 4 of 25 & 26 Vict. c. 42, provision in as to, 1271.
 where action commenced before filing bill, Court will not, upon bill seeking relief, the title to which is dependent upon the legal right, assume, as of course, jurisdiction under above Act, 1271, 1108.

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 where Court refuses to enforce a covenant because damage would be inappreciable, the case must be perfectly clear, 910.
 no inference in Equity on breaches, on ground the work had been ordered, but improperly done, 1097.
 Court will relieve mortgagor from an action upon a covenant executed in ignorance and without consideration, 1101.
 where covenant is broken for want of lessor's consent, receipt of rent waives forfeiture, 59.
 Equity aids tenant in preventing landlord breaking covenant which works forfeiture of tenant's estate, 60.
 where covenants are indefinite, no injunction, 63; where clear, injunction granted, 64.
negative covenants, where breach of, restrained, 781; when not restrained, 781.
 upon interlocutory application it is a question of comparative injury, 64.
 where an estate is vested in trustees who sell plots for building, subject to restrictive covenants of which the trustees, as covenantees, are trustees for all persons claiming under them, each purchaser has an equity against the

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- other purchaser to compel the observance of the covenants, but such equity may be lost by acquiescence, 64; but a plaintiff, though barred by acquiescence from an injunction may obtain damages under Cairns' Act (21 & 22 Vict. c. 27),
- no relief (here) upon covenant for quiet enjoyment against raising a water-course, the damage being inappreciable, 65.
- a covenant in a lease to use a house as a dwelling-house only, is a covenant running with the land, and is binding on the assignee of the lessee, and assignee and his sub-tenant will be restrained committing breach, 66.
- the purchaser of a reversion with notice of restrictive covenant is bound in Equity thereby, 66; the assignee of a covenantor is bound if he has notice of the covenant, 73, 81; and so of appointees, 73.
- absolute covenants are not controlled by recitals—ambiguous covenants are, 67.
- a breach of covenant can be restrained though there is a power of re-entry, 67.
- where there is an express covenant, and the mischief from the breach cannot be repaired or estimated, Equity restrains the breach, or if the object of the contract can only be obtained by conforming exactly to its terms, 509.
- wooden sleepers for a railway not included in a covenant to yield up works, &c., and injunction refused to prevent removal by execution creditor of sub-lessee, 68.
- the rights of an under-lessee under the original lessee's covenant to observe the covenants in the original lease, are not affected by the surrender of the original lease, 69.
- though a covenant is gone, there may be an equity from a parol representation, 69.
- covenant to secure sea-view, 69.
- a conveyance to the use that certain trades shall not be carried on amounts to a covenant, and an injunction will be granted to restrain carrying on the restricted trade, 70.
- a covenant for perpetual renewal entered into by a person having a limited interest in lands, does not bind the estates, 70.
- in a case resting simply on covenant, a party in possession is entitled to a specific performance of a covenant, parties entitled in remainder or reversion must shew material or special damage by breach, 71.
- carrying on girls' school held a breach of covenant not to carry on any trade, &c., or calling, 78; and not waived by covenantee permitting other houses under like covenant to be used as schools, 78; purchasers of lots of land are entitled to benefit of covenant not to allow anything deemed a nuisance to occupiers, &c. (and to restrain establishing national schools), 125.
- no remedy (here) on bill of remainderman against the use of a house as a school, as an alleged breach of covenant not to carry on "trade, &c., or any employment whatsoever," 71; remainderman lying by, &c., restrained recovering for want of usual building covenants, 84.
- acquiescence in lesser violation of covenant, is an objection to an interlocutory injunction against a greater one, 72; acquiescence in partial deviation from a building plan and laches disentitle to relief, 78; but acquiescence in a breach without substantial damage is no bar to restraining breach with, 92.
- if question is doubtful, the burden of proof is on plaintiff to shew balance of convenience in favour of injunction, 72.

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- plaintiff's own encroachments immaterial (here) and did not disentitle him to complain of infringement by the defendant of a covenant not to build, &c., 73.
- a subsequent purchaser of a neighbouring portion of the land may obtain an injunction against a first purchaser to restrain infringement of such covenant, 73.
- the right to enforce the benefit of a covenant passes to alienee without specific mention, 74.
- where construction of contract (covenant here), and also breach, are clear, Court will interfere by injunction, 75.
- purchaser with notice of covenant concerning the land, not running with the land, is bound in Equity, 76, 77; such a purchaser will be restrained violating covenants, whether they run with the land or not, 1105.
- covenant to keep gardens unbuilt on, enforced against purchaser with notice, 77; *covenant not to build without consent*, ejectment for breach, restrained on a balance of convenience and inconvenience, 1106.
- lessee will be restrained though there be a penalty for breach of the covenant, 78; or forfeiture and a penalty, 78.
- an injunction will be granted in the case of an express covenant, but not in the case of an implied one, against tenant removing articles contrary to custom of country, 78; but, otherwise an act impliedly forbidden will be restrained, 97.
- sub-lessee will be restrained doing acts (against a covenant avoiding the lease in certain events), to endanger title of his lessor, 79.
- an injunction will be granted to restrain pulling down, &c., materials, notwithstanding a covenant to repair, &c., 79.
- the Court will restrain breach of farming covenants, 79.
- the Court will restrain tenant from year to year from cutting hedgerows, &c., except according to custom of the country, &c., 80; yearly tenant not inquiring into title is affected with notice of covenant and bound, 94.
- the Court restrains breaches of covenant though there is a penalty or forfeiture, 80.
- where a covenant is not to do an act, and a penalty or forfeiture is annexed to the doing it, the penalty does not authorize the act, and before the act is done, the Court will restrain it, 80.
- if subsequent acts of covenantee alter character of the lands, so as the restriction is no longer applicable—no injunction, 81.
- covenant by grantees not to use a well to prejudice of grantors, proprietors of waterworks, 83.
- upon a covenant to pay rent it must be paid, notwithstanding premises burnt down, tenant has no equity to spend insurance money in rebuilding, 84.
- where covenant to renew lease, upon ejectment for non-payment of rent, renewal decreed, upon accounting for delay, 84.
- no relief where covenantor had no notice of breaches till end of term, 80.
- action for breach restrained, on ground of vexation by repeated actions for breach, 1101.
- action for breach of covenant to build and insure restrained (here), 1102.
- covenant not to let or demise without consent, restrains assignment, 84;

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- assignment by operation of law is no breach of a condition not to assign, *ex gr.* if lessee become bankrupt, 86.
- covenant to insure against fire, Court now relieves against breach of, in certain cases under 22 & 23 Vict. c. 35 .. 86 ; but not more than once, 87 ; but Equity will relieve against forfeiture of covenant to insure performed substantially, 87 ; but will not interfere to modify a strict contract to insure against fire, 1103 ; but action restrained (here) as to past breaches, 1103.
- no relief against covenant to repair in a given time, 87.
- where covenant to repair, Court will allow a reasonable time, 88, 1083 ; relief granted, and upon such a covenant, to tenant of lunatic's estate, 88 ; so where lessee is unable from circumstances to complete repairs within the time specified, 1079 ; relief on covenant to repair under peculiar circumstances of case, 1101.
- no relief against wilful voluntary breach of covenant, 88.
- if defendant prevent performance of covenant, Equity removes the opposition, 88.
- covenant to lay out, &c., land in an ornamental manner, &c., 89.
- lessee covenantee cannot restrain dean, &c., covenantors, cutting, &c., timber for repairs, 89.
- breach of covenant partly executed, restrained, and damages for executed breach, 90.
- Court will not refuse interference, on the ground of mistake of both parties in form of covenant, or of inconvenience to the public, 90 ; or that the work in breach is of great public importance, 91.
- a restrictive covenant is enforceable where constructive notice, though covenantee has no reversion, 93.
- Court can restrain further breaches of covenant, where covenantee has been compelled repeatedly to resort to Law, so as to become vexatious, 1192.
- Court will restrain breach, gradual and not conspicuous, 94.
- covenantors (here), a right to alter roadway, 95.
- where material breaches permitted to be made by some purchasers, no injunction to restrain another purchaser, 95.
- breach of covenant to build house under, &c., architect in twelve months, by building after that time, against architect restrained, 96.
- covenants as and relating to public-houses, &c., 94, 96—98.
- building a wall eight feet high not a breach (here) of covenant to build only dwelling-houses, so (here) building a stable, 96.
- implied covenant to procure land for lessees to make a railway, enforced, 98.
- lessee is bound to inquire, and fixed with notice of covenants entered into by lessor, 98 ; and original grantor can file a bill against lessee, grantee not a necessary party, 99.
- it is no ground for interference of Equity in breaches of covenant that persons had been employed to make drains, but that they did not work properly, 1097.
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See BANK OF ENGLAND; DISMISSAL OF BILL; DISSOLVING INJUNCTIONS; SHIPPING, &c.; STAKEHOLDER.

INTERROGATORIES: See DISCOVERY.

INTRUSION,

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I. O. U.s,

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See MOTIONS, &c.; VERDICTS.

J.

JOINT STOCK COMPANIES REGISTRATION ACT (7 & 8 Vict. c. 110):

See COMPANIES.

JOINTURE: See BOND.

JUDGMENT DEBTS: See LIENS, &c.

JUDGMENTS.

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British subjects in a foreign country, Court no power to restrain, from doing there whatever they are authorized to do there by the sovereign power there, 1007.

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Scotland, proceedings in, *tutor dative* restrained (here) continuing, 1009.

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illegality of transaction in England, no ground for stopping proceedings in a foreign Court, 1013.

contract concerning an estate in a colony, there is jurisdiction in this Court upon, 1015; but the Court will not interfere where the question has been before a Court of competent jurisdiction in the colony, and allegations in the bill of fraud are merely general and denied, 1015.

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Ireland, suit in, restrained, there being a decree in England for same objects, 1025; Chancery in England cannot restrain Irish creditor from recovering against estate of deceased intestate domiciled and leaving property in Ireland, 1050.

Land, where Equity can entertain a bill respecting, though it is *not within its jurisdiction*, 1028.

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See ACTION AT LAW; ADMINISTRATION; APPEAL; BANKRUPTCY; BILLS OF EXCHANGE; BONDS; COMPENSATION; COUNTY COURTS; CREDITORS; DURESS; INFANTS; INJUNCTIONS RESTRAINING PROCEEDINGS IN FOREIGN COURTS; JUDGMENTS; POLICIES; TRUSTS, &c.

JURY: See ISSUES.

JUSTICES—JUSTICES OF THE PEACE: See MAGISTRATES.

L.

LACHES,

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See ACTION; AWARDS; BREACH OF INJUNCTIONS; COVENANTS; DIRECTORS; DISSOLVING INJUNCTIONS; INTERIM ORDERS; INTERLOCUTORY INJUNCTIONS; INTERPLEADER; SHARES; SURVEYORS; WATER.

LANCASTER, CHANCERY COURT OF: See JURISDICTION.

LAND,

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See JURISDICTION.

LANDLORD AND TENANT,

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tenant has no equity to compel landlord to spend insurance moneys against fire in rebuilding premises, nor to restrain suing for rent until premises rebuilt, 652.

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stranger building on land knowing it to be the property of another, 654.

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tenant, being mere tenant at will, building under belief he thereby acquired title to a lease, and landlord is cognisant of this, and does not interfere, 655.

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See ACCOUNT; INTERPLEADER; SET-OFF.

LANDS,

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LANDS CLAUSES CONSOLIDATION ACT, 1845.

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LAND TAX: See GUARDIAN AND WARD.

LAW, COURT OF,

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LAW, DECISION AT: See APPEAL.

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LEASES,

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Equity restrains lessee and his sub-lessee, where lessee has notice landlord will not let for a particular purpose, 656.

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no sale or underletting (here) by assignees of bankrupt without consent of lessor, 56.

lessee restrained from *assigning without consent of lessor*, bill for specific performance against, by assignees of bankrupt, 1032.

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if the danger of forfeiture arise from defendant's acts, Court will decree specific performance, 57.

no relief against *re-entry and forfeiture for non-payment of ground rent*, where a new lease had been offered upon payment of arrears and costs at Law, 57.

solvency or insolvency of tenant upon a contract for a lease, is an objection of weight, 58.

lessee redeeming lease forfeited for non-payment of rent, terms of, obtaining injunction under the 4 Geo. 2, c. 28, and the Common Law Procedure Act (15 & 16 Vict. c. 76), 58.

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the Court requires the strongest expressions in a *mining lease*, to induce it to imply *covenant to sink a shaft* upon the demised land, 60.

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LEASES—*continued*.

and working ruinous, 1098; unless lessee will give landlord all he would be entitled to, if the mine had been worked, 1098.

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See ACQUIESCENCE; AGREEMENTS; CORPORATIONS AGGREGATE; COVENANTS; EJECTMENT; EXECUTIONS; FIRE INSURANCE; FORFEITURES; LIENS; LUNATICS; MUNICIPAL CORPORATIONS; NOTICE; PENALTIES; RAILWAY COMPANIES; REVERSIONS; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER.

LECTURES: *See* PUBLISHING, &c.

LEGAL INSTRUMENTS,

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LEGAL RIGHTS—LEGAL TITLE,

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no declaration of legal rights, with reference to possible future acts, 178.

if the plaintiff's title is doubtful, and injury not very material and completed before bill filed, the Court will not try the question of legal title, 178.

though legal right doubtful, Court will, in its discretion, according to exigencies, &c., grant an injunction, 1030, 1031.

if determination of the legal right is in plaintiff's favour, he has a strict right to an injunction, until hearing, 1271.

unless a case depending on a legal right is very clear, no interference until right ascertained, 1033.

if an action has actually commenced for purpose of determining legal title, upon bill filed after commencement, seeking relief, the title to which depends upon the legal right, Court will not as of course assume exclusive jurisdiction under 25 & 26 Vict. c. 42, and restrain proceedings in the action, 1108, 1271.

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law or fact, question of, to be determined by the Court of Chancery, but issues may be directed to the assizes, where more conveniently tried, 178.

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LEGAL RIGHTS—LEGAL TITLE—*continued*.

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irreparable mischief stayed, though denial of title, 180.

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legal title to moveables, in acquiring, question may arise, what law is to prevail, 392.

what makes a good title to moveables all over the world, 392.

legal right, neglect to proceed at Law, upon case standing over for that purpose, 1151.

legal right, *delay in asserting*, and damage slight—no injunction to restrain infringement, 456.

Court interposes to enforce legal rights or to prevent mischief until the right is ascertained, 464.

Court must be satisfied plaintiff has sustained substantial damage from violation of legal right, to entitle to injunction, 906.

if matter in dispute is distinctly raised and ready for decision, the right should be declared, and an injunction founded thereon, 906.

where relief depends upon a legal right, the proper course is first to ascertain the law, 907.

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though a Court of Law should certify against plaintiff's title, still the cause must proceed to a hearing, 1272.

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See COURT OF COMMON LAW ; DAMAGES ; INTERLOCUTORY INJUNCTIONS ; RIGHT OF WAY.

LEGATEE : *See* EXECUTORS, &c.

LESSOR—LESSEE : *See* BURNING ; COVENANT ; NUISANCE.

LETTERS,

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LETTERS—*continued*.

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LETTER OF UNDERTAKING,

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See PUBLISHING, &c.

LIBEL,

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See TRADE MARK.

LIENS,

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moneys advanced to complete ship, up to date of agreement to sell ship to creditor, *lien* (here) for, 559.

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TRADE MARKS,

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- of a Common Law right of action*, 329; and is only ancillary to the legal right, 330.
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- elements of right to property in a trade mark, 349.
- what entitles to an injunction, 349.
- no exclusive ownership of symbols constituting a trade mark* apart from their use, but the *exclusive right to use the mark is property*, and the jurisdiction of the Court is founded on such property, not upon the fraud against the public, 311.
- no man has the right to sell his own goods as the goods of another, or to adopt symbols to which he has no exclusive right*, and thereby to personate another, to mislead the public, 331.
- the right to protection does not depend on any exclusive right to a particular name or form of words, but to be protected against fraud, 332.
- Equity protects trade marks on the ground that a party will not be allowed to sell his own goods as the goods of another; nor will he be allowed to use indicia by which he may pass off his own goods as the manufacture of another*, but if plaintiff appears to have been guilty of misrepresentation to public, *no injunction* in first instance until legal right established, 332.
- scienter*, although not proved, injunction granted, but no account, 340.
- no protection for trade mark unless applied by defendant to same kind of goods*, and may be and is mistaken for plaintiffs, and prejudicial to plaintiff, 312.
- any one may manufacture articles which have become known by a name, and use that name, but not so as to mislead, 348.
- trade mark containing material misrepresentation* not protected, 312.
- if a name upon a commodity passes current as a representation that the article was manufactured by a particular person, Court will not transfer it to another, without addition, but a purchaser of the business may represent himself as successor and use the name, and if name is used after death of manufacturer, it becomes in time a trade mark or sign of quality, and will be protected—such a mark is property of a partnership and may be sold with the assets of the partnership, 312.
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essential qualities, some of, to constitute property in trade mark are probably—mark not copied, no false representation, and article vendible, 313.

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negotiations previous to a suit (save bad faith) not regarded, unless a release or binding agreement, 314.

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proof of actual deception is not necessary, but Court must be satisfied resemblance likely to mislead, 320.

no injunction where defendant not shewn to have had an *intention to mislead*, nor to have in fact misled, the public; but *if the public be misled, though unintentionally*, the Court will grant *injunction*, 324; in colourable imitations of trade marks *Court considers whether the public would probably be deceived, not manufacturers*, 326.

if, *without intention to defraud*, a person uses a trade mark of firm which has for a considerable time carried on trade using the mark, Court restrains, 335.

where a trade mark contained statements which, though true as regarded original adopter, were calculated to deceive the public when used by assignee, assignee not entitled to protection, 336.

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slight differences will not protect from injunction, 349.

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resemblance must be such as likely to mislead ordinary persons, &c., 341.

actual physical resemblance not the sole question, 341.

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the introduction into market of an article new as an article of commerce though previously known, and the acquiring a reputation therefrom by a name not merely descriptive, entitle the name to be protected—and this though the peculiarity of the name has been in use as applied to a different kind of goods, 316.

although a person may have abandoned right to exclusive use of a term, he is entitled to restrain a person selling a similar article as the "original" one, 316.

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Court restrains use of an arbitrary name applied to a particular class of goods, where the sale of that class is open to all the world, but not where the class of goods is a patented article, 318.

if a decree directs defendant to account for goods sold with particular stamp, defendant is compelled to disclose names of persons to whom he sold such goods, if unable, then to disclose to whom he sold goods which he will not swear were unstamped, 320.

damage must be proved, Court will not assume plaintiff would have sold all defendant sold marked, 340.

there must be between the genuine and fictitious marks such general similarity, &c., as to have a direct tendency of misleading buyers who exercise the usual amount of prudence and caution, and there must also be such a distinctive individuality in the mark, as to procure to the counterfeiter the benefit of the deception resulting from the general resemblance between the genuine and counterfeit labels, or trade marks, 320.

if strong resemblance in matter, colour, and arrangement, Court presumes it is intentional, and to mislead, 328.

the Court considers whether differences are natural, from necessity, or colourable and intended to deceive, 328.

answer uncontradicted, setting up a custom of manufacturers to affix trade marks as directed by the merchant, and that plaintiffs, a foreign company, had ordered goods to be manufactured in England with their own trade mark as manufactured in plaintiff's country, course of Court upon, 321.

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goodwill, no distinction between sale of business, &c., by trader or his assignees in bankruptcy, 345.

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the Court will *restrain imitation of label appearing to designate goods manufactured by plaintiffs, the representatives of patentees of an expired patent, and this though the plaintiffs' labels were not strictly true in using the word "patented;" but defendant entitled to represent his article as manufactured according to the patent*, 327.

imitation of blacking label restrained, though difference appeared on careful reading, 333.

where an *article not patented was represented as such, and four months allowed to pass without taking steps, an interlocutory injunction refused, but liberty to bring action, and if legal right proved, an injunction would be granted*, 328.

the word "patent" as a word of art, &c., not such a misrepresentation as to deprive of right of protection of trade mark, 345.

use of a trade mark "J. R. & Sons," by one of a firm (N. & W. R.) restrained—held a contempt, 327.

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a person *selling an article in his own name, not restrained by a person who has used same name, unless fraud*, 328.

the *assumption by one company of a similar name of another, but without probability of doing injury, not sufficient for an injunction*, 330.

sale of pills in imitative boxes as "H. H.'s Pills," restrained by prior seller of pills as "H.'s Pills," 329.

no injunction to restrain sale of quack medicine, as that of an eminent physician, as the Court has no jurisdiction to restrain a libel, 330.

defendant *selling a similar medicine to plaintiff's—labelled with plaintiff's name and certificates of plaintiff's medicine—so as colourably to appropriate them to his own, restrained*, 331.

where plaintiff had used a considerable degree of misrepresentation in statements to the public, *injunction refused until title established*, 331, 332; as to tea, 333.

running an omnibus with words, &c., forming a colourable imitation of words, &c., on plaintiff's omnibus, restrained, 333.

shop-front, representations on, to induce public to believe owner connected with a firm, &c., restrained, 339.

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partnership, upon dissolution of, each partner may carry on business in name of old firm, 334.

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where infringement avoided by sailing near the wind, 348.

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fraudulent imitation of a publication *not clearly made out*, course of Court, 345.

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See BUSINESS; COPYRIGHT; COSTS; DISCOVERY.

TRADE PERSONAL CHATTELS: See EXECUTIONS.

TRANSFER,

of personal property is regulated by domicile, disregard of such law is an infraction of the comity of nations, and Chancery decrees restitution, 394; but creditor pursuing chattel to a foreign country where he knows rights of third parties will be disregarded, not relieved, 394.

TRANSLATIONS: See COPYRIGHT.

TREES,

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TRESPASS,

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trespass in the nature of waste, relief against, has superseded injunctions to quiet possession, 7.

enjoined, where irreparable damage, 7.

the Court enjoins trespass where *irreparable mischief* is the consequence, 465. so where there is *destruction of the inheritance*, 46.

Court will by mandatory injunction restrain trespass the continuance of which would inflict irreparable damage upon persons in possession, 468.

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TRUSTS—TRUSTEES,

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trustee not permitted to use powers trust confers on him at Law except for his trust, 599.

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Equity restrains trustee of land from parting with land and removing a trust fund beyond reach of Court, 603.

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cestui que trust compelled to resort to foreign country for enforcing rights against trustee refusing to do his duty, notice of proceedings, costs, 1017.

a private debt due from a trustee cannot be set off against a debt owing to a trustee in his character of trustee, 1171.

the case of a trust, or restriction for the preservation of ornamental timber, is one which the Court will endeavour to execute or enforce, 142.

Court will execute trust of money for taste or ornament, *semble*, 142.

trustees contracting to sell without proper care, or inconsistent with trust, restrained, 548.

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TURF, CUTTING OF: *See* TRESPASS.

TUTOR DATIVE: *See* JURISDICTION.

U.

ULTRA VIRES,

See ACQUIESCENCE; RAILWAY COMPANIES.

UNCONSCIONABLE BARGAINS,

jurisdiction of Court over, is not affected by repeal of usury laws, nor by 31 Vict. c. 4, s. 1, as to reversionary interests, 1049.

UNDERTAKING,

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UNDUE INFLUENCE,

no person standing in relation of special confidence to another, so as to acquire habitual influence over his mind, can accept any gifts, &c., from the person under the dominion of that influence, unless protection interposed, 617.

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UNIVERSITIES,

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USURY—USURY LAWS,

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United States, law of Courts of Equity there on usury; Hilliard, Inj., pp. 16, 67, &c., 2nd ed.

See BONDS; UNCONSCIONABLE BARGAINS.

V.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE,

if the circumstances which give rise to the danger of forfeiture (here) of a lease arise from the defendant's own acts, Court will decree specific performance, 57.

in Equity property is alienated without a formal conveyance, 202.

a contract to transfer passes the property, and vendor is trustee for vendee or mortgagee, such contract may be applied to *future acquired property*, 202.

no injunction where there is a *mistake by each party as to subject matter of the contract*, 202.

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- if principal portion of agreement cannot be specifically enforced, no relief in respect of a negative clause merely incidental to the general relief—unless the agreement in other respects is subsisting, 214.
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- purchaser for value of bond without notice* that it had been obtained by fraud, not restrained from dealing with it, 208.
- purchaser for value not bound by covenant not running with land*, unless actual notice, or precautions taken that by proper inquiries he would have had notice, 230.
- purchaser restrained proceeding at Law for purchase-money entering into possession, knowing objections, and negotiating, 1121.
- action by purchaser for deposit*, Court will in a suit by vendor restrain, 208; unless where description in particulars of sale is calculated grossly to deceive, 1112.
- where vendor had proceeded in treaty beyond time for completion, and had then brought an action, &c., action by purchaser for deposit not restrained, 1115; so where vendor had given notice of an intention to re-sell, 1117; such notice is equivalent to a declaration that vendor will not seek specific performance, 1117; action by vendee for deposit not restrained (here), 1120.
- action against auctioneer for the deposit* restrained, although the estate was sold as freehold with leasehold, and it turned out almost all leasehold, 1113.
- action by vendee against auctioneer for deposit, restrained, and auctioneer ordered to pay deposit money into Court, 1119; not restrained where delay amounting to abandonment of contract by vendor, 1120.
- though vendor retains possession of estate, the Court will not restrain action for deposit, nor compel vendor to pay it into Court, if delay in completion of contract is occasioned by purchaser, 1114.
- purchase money, action by vendor for*, restrained, vendor executing purchase deed without purchaser, &c., being present, and insisting purchase-money should be paid to his solicitor or solicitor's clerk, without written authority, 1117.
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- objection to title*—decree for sale for payment of simple contract creditors—unsatisfied judgments against heir—judgment creditors not parties to suit, 1120.
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- verbal agreement for lease* at a certain rent and term, and plaintiff let into possession, ejectment restrained, and specific performance decreed, 209.
- breach of ordinary covenants*, proof of acts amounting to, must be clear, and the breaches gross and not waived, to disentitle to specific performance, 210.
- upon *purchase by wife for husband*, and possession by husband, specific performance decreed, 210.
- waters*, breaches of a contract as to the mode of enjoyment of, restrained, it is no answer that the acts were not injurious, or even if they were beneficial, 211.
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- hiring and service*, specific performance of contract of, will not be enforced, and no injunction to restrain excluding from management; and so of an agreement for continuance of plaintiff's *personal service*, 212.
- in *contracts for personal services* Court cannot enjoin even when an agent has been wrongfully dismissed, 213.
- inn*, Court has no jurisdiction to restrain discontinuing to use premises as an, but might restrain covenantor permitting any act which would have disabled him from carrying on the business, 213.
- judgment creditor of vendor restrained in suit of purchaser for specific performance, proceeding at Law against purchaser who had not paid whole purchase-money, and was in possession, 1212.
- furnishing drawings*, Court cannot enjoin, 214.
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Cousens v. Rose—Right of way.

Duffryn Steam Coal Company v. Taff Vale Railway Company—Railway companies—Running engines, &c.

Flower v. Flower—Husband and wife.

Ford v. Foster—Trade marks.

Greene v. West Cheshire Railway Company—Railway companies—Siding.

Gullick v. Tremlett—Nuisances—Effluvia and noise.

Hamilton (Duke of) v. Graham—Minerals, reserving tunnel through.

Hamilton v. Hector—Children, custody of.

Hext v. Gill—Mines—Minerals.

Isaacson v. Thompson—Trade marks.

James v. James—Secrets.

Jegon v. Vivian—Mines.

Jones v. Stanstead, &c., Railway Company—Railway companies—Bridge over river.

Kemp v. South Eastern Railway Company—Railway companies, agreement as to taking lands, &c.

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Wotherspoon v. Currie—Trade Marks.
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Wynne, In re—Lunacy.

